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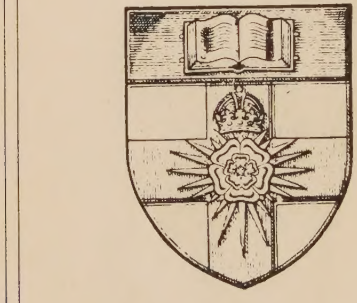

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1908.

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The Right Hon. Sir Samuel Walker, Bart.

Lords Justices of Appeal.

The Right Hon. Gerald Fitz Gibbon.

The Right Hon. Hugh Holmes.

Chancery Division.

The Right Hon. R. E. Meredith, M.R.

The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. John Ross.

Irish Land Commission: Judicial Commissioners.

The Hon. J. O. Wylie.

The Hon. Gerald Fitz Gerald.

Attorney-General.

The Right Hon. Richard R. Cherry.

Solicitor-General.

Redmond J. Barry, K.C.

[These Reports will be cited as follows :—[1908] 1 I. R.]

REPORTERS.

Court of Appeal,	WILLIAM GREEN, R. ST. J. CHADWICK, R. G. L. LEONARD,	Barristers-at-law.
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Land Judge,	D. M. STEEN,	Barrister-at-law.
Land Commission,	JOHN EDWD. WALSH,	Barrister-at-law.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aldritt *v.* Maconchy,	333
Anderson's Estate, *In re*,	537
Armstrong *v.* Gamble (*In re* Turner, deceased),	274

B.

	PAGE
Bandon's (Earl of) Estate, *In re*,	120
Beamish *v.* Whitney,	38
Black *v.* Scottish Temperance Life Assurance Co.,	541, 561, 577
Bradshaw *v.* Bradshaw,	288
British Law Fire Insurance Co., Gaw, *v.*	245, 252
Bunbury *v.* Hibernian Bank,	261
Burton *v.* Nunan,	190, 201
Butler, Sweetman *v.*	517

C.

	PAGE
Callwell and Domvile's Contract, *In re*,	475, 488
Cayley, King-Harman *v.*	511
Chichester's Estate, *In re*,	297, 303
Clanricarde's (Marquis of) Estate, *In re*,	423, 434
Collen Brothers *v.* Dublin County Council,	503

D.

	PAGE
Deignan, Dunne *v.*	228
De Vesci (Viscountess) *v.* O'Connell,	452
De Vesci's (Viscountess) Estate, *In re*,	237
Dixon and Ulster Bank, Workingman's Benefit Building Society *v.*	582, 587
Domvile and Callwell's Contract, *In re*,	475, 488
Dublin County Council, Collen Brothers *v.*	503
Dunne *v.* Deignan,	228

F.

	PAGE
Fishguard and Rosslare Railways, *In re*; *Ex parte* Kilkenny County Council,	321
Fitzgerald *v.* Persse, Limited,	279
Fitzgibbon *v.* M'Neill,	1

G.

	PAGE
Gamble, Armstrong *v.* (*In re* Turner, deceased),	274

PAGE

Gaw *v.* British Law Fire Insurance Co., 245, 252
Gore-Booth's Estate, *In re*, 387
Gough, Rowe *v.* 402, 411
Gun's Estate, *In re*, 111, 119

H.

Henderson, Munro *v.* 260
Hennessy *v.* Keating, 43, 73, 466
Hibernian Bank, Bunbury *v.* 261
Hillhouse *v.* Tyndall, 446
Hurley *v.* Hurley, 393

J.

Johnston, O'Neill *v.* 358

K.

Keating, Hennessy *v.* 43, 73, 466
Ker's Estate, *In re*, 293
Kilkenny County Council, *Ex parte*; *In re* Fishguard and Rosslare Railways, 321
King-Harman *v.* Cayley, 511
King-Harman's Estate, *In re*, 202
Knipe *v.* Riddall, 104

L.

Lucy *v.* Sexton, 350

M.

M'Causland's Trusts, *In re*, 327
M'Fadden and Todd's Contract, *In re*, 213
M'Hugh *v.* M'Hugh, 155
M'Neill, Fitzgibbon *v.* 1
Maconchy, Aldritt *v.* 333

PAGE

Malone's Estate, *In re*, 270
Munro *v.* Henderson, 260

N.

Northern Milling Co., *In re*, 473
Nunan, Burton *v.* 190, 201

O.

O'Connell, De Vesci (Viscountess) *v.* 452
———, Petitioner; *In re* Thomson's Estate, 452
O'Neill *v.* Johnston, 358
O'Sullivan, Rushbrooke *v.* 232

P.

Persse, Limited, Fitzgerald *v.* 279
Powell's Estate, *In re*, 15

R.

Rex, Richmond District Asylum Board *v.* 21, 31
Richmond District Asylum *v.* Rex, 21, 31
Riddall, Knipe *v.* 104
Roberts' Estate, *In re*, 222
Rowe *v.* Gough, 402, 411
Rushbrooke *v.* O'Sullivan, 232
Ruttledge's Estate, *In re*, 18
Ryan's Estate, *In re*, 467

S.

Scottish Temperance Life Assurance Co., Black *v.* 541, 561, 577
Sexton, Lucy *v.* 350
Staples *v.* Young, 135, 139
Sweetman *v.* Butler, 517

T.

	PAGE
Thomson's Estate, *In re*; O'Connell, Petitioner,	452
Todd and M'Fadden's Contract, *In re*,	213
Turner, deceased, *In re*; Armstrong *v.* Gamble,	274
Tyndall, Hillhouse *v.*	446

W.

	PAGE
Weir's Estate, *In re*,	161, 172
Whitney, Beamish *v.*	38
Winter's Estate, *In re*,	529, 535
Workingman's Benefit Building Society *v.* Dixon and Ulster Bank,	582, 587

Y.

Young, Staples *v.*	135, 139

TABLE OF CASES CITED.

A.

PAGE

Adnam *v.* Earl Sandwich, 530, 531, 534, 536, 537
Ailesbury (Marquis of) and Lord Iveagh's Contract, *In re*, 482, 486, 489, 490, 496, 498, 501
Alaska Packers' Association *v.* Crooks & Co., . . 53, 55, 75
Aldritt *v.* Maconchy, . 263, 268
Alison, *In re*, . . . 42
Allcard *v.* Walker, . . . 318
Allin *v.* Crawshay, . . 521, 523
Armstrong *v.* Armstrong, . 289
Armstrong's Estate, *In re*, . 16
Arnott *v.* Arnott, . . . 229
Atkins *v.* Hiccocks, . . 6
Attorney-General *v.* Walthamstow U.D.C., . . . 550
Attorney-General for the Isle of Man *v.* Mylchreest, 140, 141, 144

B.

Bandon's Estate, *In re*, . . 223
Barry Railway Co. *v.* Lord Wimborne, *In re*, . . 489
Bates, *In re*, ... 7
Baxter *v.* Morgan, . . . 157
Beaupré's Trusts, *In re*, 305, 317
Bective Estate, *In re*, . . 490
Belfast (Earl of) *v.* Chichester, 304, 313
Bell *v.* Wilson, . . . 139
Berkeley Peerage Case, . . 313
Bevan *v.* Webb, . . . 194
Bird's Trusts, *In re*, . . 522
Biss, *Re*, ... 194
Blackhall *v.* Nugent, . . 196
Blake, *Re*, ... 126
Bourne *v.* Swan & Edgar, 51, 61, 64, 76, 84
Bracebridge *v.* Cook, 394, 398, 400
Brennan *v.* Boyne. . . . 193
——— *v.* Dorney, . . . 356
Bright *v.* Walker, . . 206, 208
Bristow *v.* Cormican, 361, 362, 364, 370, 373, 377, 378, 380
Browne's Will, *In re*, . . 6
Butler's Trusts, *In re*, . . 395
Byrne *v.* Londonderry Tramway Co., ... 83
Byrne's Estate, *In re*, 289, 290, 291

C.

Carleton *v.* Leighton, . 304, 312
Carlisle *v.* Gosford, . . 126
Carson *v.* Jameson, . . 448
Carter *v.* Lowe, . . . 395
Chambers *v.* Kingham, . . 395
Champ *v.* Champ, . 522, 523, 527
Chaplin *v.* Brammall, . . 269
Chicago and North-Western Granaries Co., *In re*, . 286
Christiansen's Trade Mark, *In re*, ... 50, 75, 78
Cleary *v.* Fitzgerald, . . 583
Cleveland's Settled Estates, *In re*, ... 16
Clifden, *In re*, . . 39, 41, 42
Clowes *v.* Hilliard, . . 304, 314
Colls *v.* Home and Colonial Stores, Limited, 549, 559, 560, 567, 579, 580
Cooke *v.* Cooke, . . . 11
Cooper *v.* Martin, . . . 390
Cork and Youghal Railway Co. *v.* Hartnell, . . . 326

PAGE

Cornwallis-West and Munro's Contract, *In re*, 481, 487, 489, 501
Cowper *v.* Laidler, . . . 549
Cramer Roberts' Estate, *In re*, 490
Crockett *v.* Crockett, . 289, 290
Croker *v.* Brady, . . . 193
Crommelin, *In re*, . . . 196
Crosbie's, T., Estate, *In re*, ([1905] 1 I. R. 570), . 176, 179
———, J. D., Estate, *In re*, ([1906] 1 I. R. 515), . . 114
———, J. D., Estate, *In re*, ([1907] 1 I. R. 116, 126) 114, 172, 179, 185
Crozier *v.* Crozier, . . 6
Curtis *v.* Graham, . . 289
Cussen *v.* Hynes, . . . 230

D.

Daniel's Settlement Trusts, *In re*, ... 521
Darvill *v.* Roper, . . . 140
Davis *v.* Angel, . . . 314
Davis, *In re*, ... 330
Dawson *v.* Oliver Massey, . 6
——— *v.* Stewart, . . . 54
De Beauvoir *v.* De Beauvoir, 193, 198
De Kuyper *v.* Baird, 49, 51, 52, 55, 56
De La Touche's Settlement, *In re*, ... 522
Dennehy *v.* Delaney, 522, 523, 526, 528
Denny *v.* Wright, . . 449, 450
Dever, *Ex parte*, . . . 315
De Voeux *v.* Mara, . . 469
Dicconson *v.* Talbot, . . 243
Dickin and Kelsall's Contract, *In re*, ... 482
Doe d. Rawlings *v.* Walker, 194, 398
Donnelly *v.* Foss, . . . 469
Doody *v.* Higgins, . . . 198
Downing *v.* Seymour, . . 400
Doyle *v.* Crean, . . . 523
Doyle's Estate, *In re*, . . 16
DuCane and Nettlefold's Contract, *In re*, 482, 484, 485, 491, 501
Duckett *v.* Thompson, . . 522
Duncan *v.* Topham, . . 216
Dungannon *v.* Smith, . 304, 313
Dursley *v.* Berkeley, . 304, 312

E.

Eastman Photographic Materials Co. *v.* Comptroller-General of Patents, Designs, and Trade Marks, . . . 434

PAGE

Eaton *v.* Barker, . . . 6
Edelsten *v.* Edelsten, . . 61
Edwards *v.* Aberayron Mutual Ship Insurance Society, 247, 248, 256, 257
Ely's Estate, *In re*, . 241, 242

F.

Ferguson *v.* Gosford, 106, 108, 109
Fishbourne *v.* Hamilton, 138, 139, 141, 144, 149, 153
Fitzgerald *v.* Byrne, . . 6
Flood *v.* Flood, . . . 157

G.

Gage *v.* Acton, . . . 394
Gibbins *v.* Eyden, . . 304, 314
Glasgow (Lord Provost, &c., of) *v.* Farie, 140, 144, 146, 147, 148, 154
Glass *v.* Patterson, . . 122, 125
Gompertz *v.* Gompertz, . 5, 7, 11
Goodman *v.* Harvey, . . 263
Great Western Railway Co. *v.* Blades, 139, 141, 145, 146, 148, 150, 155
Greer *v.* Greer, . . 583, 586
Griffith *v.* Brown, . . . 241
——— *v.* Taylor, . . . 216

H.

Hamilton *v.* Donegall, . . 364
Hancock *v.* Watson, . 5, 7, 10, 12
Harlock *v.* Ashberry, . . 42
Harty *v.* Davis, . . 39, 41
Hasluck *v.* Pedley, . . . 125
Hayes' Settled Estates *In re*, 482, 485, 491
Hegarty *v.* Coleraine U.D.C., . 506
Hennessy *v.* Dompé, . 53, 80
Hewitt, *Re*, ... 230
Hext *v.* Gill, 135, 140, 141, 143, 144, 145, 146, 148, 149, 153
Higden *v.* Williamson, 304, 305, 312
Higgins *v.* Betts, . . . 560
——— *v.* Dawson, . . 157
Hill *v.* Brown, . . . 241
—— *v.* East and West Indian Dock Co., . . 224, 458, 464
Hilliard *v.* Moriarty, . 473, 474
Hurst *v.* Hurst, . . . 7

I.

PAGE

Inderwick *v.* Tatchell, . . 157
Ingle *v.* Vaughan Jenkins, 394, 397, 399
Irish Land Commission *v.* Farrelly, . . 531, 533, 534
—— *v.* White, 530, 531, 532, 534
Irish Society *v.* Bishop of Derry, 362
———— *v.* Crommelin, . 364
Isaacs, *In re*, ... 16

J.

James, *Ex parte*, . . . 449
Jersey (Earl of) *v.* Neath Union (Guardians of), 138, 141, 145, 146, 147
Johnson *v.* Orr Ewing, 49, 56, 62, 85, 86, 87
Jones *v.* Barnett, . . . 223
—— *v.* Davies, 6, 394, 396, 397, 399
—— *v.* Duggan, . . . 194
—— *v.* Gordon, . . . 263
Jones, *In re*, ... 223

K.

Keay *v.* Boulton, . . . 198
Kebble *v.* Fairthorne, . . 40
Keck and Hart's Contract, *In re*, 482, 485, 491, 496, 501
Kellett *v.* Kellett, . . 5, 7
Kelly *v.* Montague, . . . 356
Kilvert's Trusts, *In re*, . . 157
Kine *v.* Jolly, 549, 559, 560, 563, 567
King *v.* Frost, . . 5, 7, 9
Kirkwood *v.* Kirkwood, . . 5
Knowles' Settled Estates, *In re*, 491
Knox *v.* Baxter, . . . 205

L.

Lacy, *In re*, . . 327, 330, 332
Lambert's Estate, *In re*, . . 584
Lassence *v.* Tierney, . 5, 7, 8, 11
Lawes *v.* Bennett, . . . 16
Lee *v.* Aylesbury, U.D.C., . 550
Leeks, *In re*, ... 126
Leinster's Estate, *In re*, . . 242
Lichden *v.* Winsmore, . . 394
Lister *v.* Pickford, . . . 331
—— *v.* Tidd, . . . 289
Listowel *v.* Gibbings, . . 140
London General Omnibus Co. *v.* Lavell, 51, 52, 53, 55, 60, 62, 75, 83

PAGE

London Joint Stock Bank *v.* Simmons, ... 263
Long *v.* Rankin, . . . 194
Longton *v.* Wilsby, . . 194
Longworth *v.* Campbell, . . 195
Lord Advocate *v.* Blantyre, . 364
Lucas, *In re*, ... 125
Lyle's Estate, *In re*, . . 16

M.

Mackenzie *v.* Coulson, . . 506
M'Vicker's Contract, *In re*, . 289
Manchester Trust *v.* Furness, . 263
Marine Mansions Co., *In re*, . 474
Martin *v.* Price, . . . 549
Meade's Settled Estates, *In re*, 481, 485, 489, 491, 498, 501
Mews *v.* The Queen, . . 27
Midland Great Western Railway Co. *v.* Craig, . . 195
Midland Railway Co. *v.* Checkley, 141
———— *v.* Edmonton Union, ... 507
———— *v.* Haunchwood Brick and Tile Co., 141, 146
———— *v.* Robinson, ... 141
Mill *v.* Mill, ... 289
Mitchell *v.* Henry, . . 52, 56
Monck *v.* Croker, . . . 6
Morris *v.* Cantle, . . . 193
Moth *v.* Frome, . . 304, 312
Mullins *v.* Smith, . . 276, 278
Mundy and Roper's Contract, *In re*, 481, 482, 484, 486, 489, 495, 498, 501

N.

Neill *v.* Devonshire, 364, 382, 384
—— *v.* Midland Ry. Co., . 506
Netherseal Colliery Co. *v.* Bourne, ... 434
Newill *v.* Newill, . 288, 289, 290
Noakes & Co. *v.* Rice, . 355, 356
North Cheshire and Manchester Brewery Co. *v.* Manchester Brewery Co., . 56, 64, 82, 83

O.

Oakden *v.* Pike, . . 217, 218
Oliver *v.* Hinton, . . 262, 345
Olphert *v.* Olphert, . . 5, 7, 8
O'Mahony *v.* Burdett, . . 7

PAGE
O'Neill *v.* M'Erlaine, . 361, 375
Oriental Hotels Co., *In re*, . 474
Orr-Ewing *v.* Johnson, . 49, 52
Otter *v.* Lord Vaux, . 283, 284
Owen and Gutch *v.* Homan, . 262

P.

Payton *v.* Snelling, 49, 55, 60, 62, 79, 83, 84
Platt *v.* Sleep, . . . 394
Powers, *In re*, . . . 40

R.

R. *v.* Berkshire (Justices of), . 215
— *v.* Monaghan U.D.C., . . 507
— *v.* Stepney Union (Guardians of), ... 507
— (Fitzwilliam) *v.* Wicklow County Council, . . . 16
Radcliffe, *In re*; Radcliffe *v.* Bewes, . . . 394, 399
Raphael *v.* Bank of England, . 263
Reddy *v.* Elliott, . 106, 108, 109
Redington's Estate, *In re*, . 294
Regent's Canal Co. *v.* Ware, . 16
Regent's Canal Iron Works, *In re*, ... 474
Reid *v.* Reid, ... 317
Roberts' Estate, *In re*, . 295, 296
Robinson *v.* Geldard, . . 276
Rogers *v.* Allan, . . . 364
Rogers, *Ex parte*, . . . 521
Roulston *v.* Caldwell, . . 20
Routledge and Sons, *In re*, . 283
Rowe, *In re*, ... 330
Rowe's Estate, *In re*, 404, 405, 406, 409, 413, 414, 415, 417, 418, 419
Russell *v.* Russell, . . . 248
——— *v.* Smythies, . . 193
Russian Petroleum and Liquid Fuel Co., *In re*, . . . 283

S.

Sanders *v.* Sanders, . . . 40, 42
Schweppes *v.* Biscombe, . . 54
———— *v.* Gibbons, . 53, 55, 76
Scott *v.* Avery, 247, 248, 250, 251, 255, 256, 257
—— *v.* Brownrigg, . . 228, 230
—— *v.* Mercantile Accident and Guarantee Insurance Co., . 257
—— *v.* Midland Railway Co., . 141
Scott, *Ex parte*, . . . 469

PAGE
Scottish Union and National Companies' Estate, *In re*, 161, 167, 172, 173, 174, 177, 184
Sealy *v.* Stawell, . . . 123
Seawin *v.* Watson, . . . 8
Seixo *v.* Provezende, 51, 56, 66, 80
Sellon *v.* Watts, . . . 276
Shaw *v.* Townsend, . . 272
Shelfer *v.* City of London Electric Lighting Co., 549, 559, 567
Sheridan *v.* O'Reilly, . . 193
Sherlock's Estate, *In re*, . 16, 539
Shore *v.* Wilson, . . . 229
Sidney, *In re*, . . . 230
Simmonds, *Ex parte*, . . 449
Singer Manufacturing Co. *v.* Loog, ... 62
———————— *v.* Wilson, . . . 51, 54, 64
Singleton's Estate, *In re*, . 223
Smallbone *v.* Brace, . . 276
Smallman's Estate, *In re*, . 584
Smith *v.* Andrews, . . . 361
Southby *v.* Hutt, . . 217, 220
Spearman's Settled Estates, *In re*, ... 482, 489
Spencer's Settled Estates, *In re*, 496
Steele *v.* M'Call, . . . 469
Stockley *v.* Parsons, 304, 317, 318

T.

Tadcaster Tower Brewery Co. *v.* Wilson, ... 356
Tasker and Sons, *In re*, . 282, 283
Tatam *v.* Haslar, . . . 263
Taylor *v.* Russell, . . . 584
Tempest *v.* Tempest, . 275, 277
Thorpe *v.* Thorpe, . . 305, 313
Tibbitts' Settled Estates, *In re*, 481, 485, 489, 490, 498, 501
Todd *v.* Great Western Railway Co., . 145, 146, 147, 153
Tollemache *v.* Coventry, . . 313
Toms *v.* Wilson, . . . 216
Townley *v.* Bedwell, . . 16
Trainor *v.* Fire Insurance Co., 257
Tredwen *v.* Holman, . . 255
Tucker *v.* Linger, . . . 154
Tunstall *v.* Trappes, . 521, 523

U.

United Club and Hotel Co., *In re*, ... 126
Upperton *v.* Nickolson, 213, 217, 218, 220

V.

PAGE
Vickery *v.* Deane, . . . 126
Vizard's Trusts, *In re*, . . 314

W.

Walton, *Ex parte*, . . 458, 464
Ward *v.* Dyas, . 522 523, 527, 528
—— *v.* M'Roberts, . . 469
Waterford C.C. *v.* Dungarvan U.D.C. 506
Webb *v.* Russell, . . . 394
Weeding *v.* Weeding, . . 16
Welman *v.* Welman, . 522, 526
Wheelright *v.* Walker, . 482, 490
White *v.* Chitty, . . 304, 310
—— *v.* Scoles, . . . 157
Whitehead *v.* Morton, . . 193
Williams *v.* Kershaw, . . 230
Wilson *v.* Gilmour, . . . 205
Wimborne (Lord) and Browne's Contract, *In re*, 482, 483, 487, 489 490, 498
Wolverhampton Corporation *v.* Emmons, . 232, 234, 235, 236
Worthington's Trade Mark, *In re*, ... 49
Wright's Trustees and Marshall *In re*, . . . 482, 484, 489

Y.

Young *v.* Radford, . . . 394

CORRIGENDA.

Page 288, line 5 from foot, *for* "petitioner" *read* "plaintiff."

Pages 425 and 434, *insert* "*H. D. Conner, K.C.,*" as counsel for the Marquess of Clanricarde.

Page 480, line 8 from foot, *for* "1881" *read* "1882."

NOTE.

The Court of Appeal have affirmed the judgments of Ross, J., in *Bunbury* v. *Hibernian Bank* ([1908] 1 I. R. 261) and in *O'Neill* v. *Johnston* (*ib.* 358), and of Barton, J., in *Hurley* v. *Hurley* (*ib.* 393).

The House of Lords have reversed the judgments of the Court of Appeal in *In re Rowe's Estate* ([1907] 1 I. R. 388), and of Kenny, J., and the Court of Appeal in *Rowe* v. *Gough* ([1908] 1 I. R. 402, 411), restoring the judgment of Ross, J., in *In re Rowe's Estate* ([1907] 1 I. R. 380). See [1909] A. C. 64.

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1908.

FITZGIBBON *v.* M'NEILL.

(1907. No. 27.)

M. R.
1907.
Mar. 9, 12, 27.

Will—Construction—Absolute gift—Restrictions as to mode of enjoyment—Legacy to daughter and gift over, in event of daughter dying unmarried, to surviving brothers and sisters—Unmarried daughter survivor.

A testator bequeathed to each of his daughters, A, B, and C, £1000 to be paid at their mother's death, provided they should have been previously married with the consent of his executors, and directed that if a daughter should not have been previously married, or if married, had been married without such consent, she was only to receive the income of the £1000 during her life, or until marriage with the consent of his surviving executor, and that if she married without such consent, and died leaving issue, the £1000 was to be divided between her children equally, and in case any daughter should die without being married with such consent and without leaving issue, the principal left to the daughter so dying should go to her surviving brothers and sisters equally.

B survived her brothers and sisters and died unmarried:—

Held, That there was an absolute gift to each daughter in the first

M. R. 1907.

FITZGIBBON v. M'NEILL.

instance, coupled with restrictions on the enjoyment of it in certain events which did not happen; and that the event which happened, namely, the survivorship of B without having been married, not being subject to any restriction, B was absolutely entitled at her death to the legacy.

Lassence v. *Tierney* (1 Mac. & G. 551.), *Hancock* v. *Watson* ([1902] A. C. 14), and *Olphert* v. *Olphert* ([1903] 1 Ir. R. 326), discussed.

ORIGINATING SUMMONS.

This was an application to determine whether, on the true construction of the will of Trevor Hill, and in the events which had happened, the testator's daughter, Eliza Hill, took an absolute interest in the sum of one thousand pounds, bequeathed to her by his will (1). The facts of the case were as follows:—

Trevor Hill, of Bessbank, in the county of Antrim, by his will dated May 5th, 1836, bequeathed to his wife, Theodora Hill, the interest of all his funded and bonded property and of all other moneys which might be due to him during her life, also the use of all furniture then in his house at Bessbank, and of all other chattel property which he might die possessed of or entitled to, save his premises at Bessbank, which he directed to be sold, and the produce applied in payment of his debts and in purchase of a commission in the army for his son George, otherwise Moore, Hill. He bequeathed to each of his daughters one thousand pounds in the following words:—

"I bequeath to each of my three daughters Theodora Eliza and Jane one thousand pounds to be paid them respectively at their mother's death provided they shall have been previously married and that such marriage shall have been with the consent of my executors but in case my said daughters or either of them shall not have been previously married or if such marriage or marriages shall have been without consent as aforesaid then I

(1) The following questions were also asked, but it became unnecessary to answer them:—2. In the event of the Court being of opinion that the said Eliza Hill had not an absolute interest in the said sum of £1000, then, on her death, did the said sum pass under the terms of the residuary bequest contained in the said will? or did the said sum of £1000, on the death of the said Eliza Hill, pass to the said testator's next-of-kin as being undisposed of by his said will. 3. If the said Eliza Hill did not take an absolute interest in the said sum of £1000, who are now entitled to the said sum, and in what shares? —[REP.]

direct that my said daughters so unmarried or marrying without such consent shall only have and receive the interest of the said respective sums of one thousand pounds during their respective natural lives or until their respective marriages with consent of my surviving executor such interest to be paid to my said daughters themselves and upon their own receipts and not to be liable to the control or engagements of any husband taken without consent as aforesaid. And I further will that in case any or either of my daughters shall marry without such consent and that such daughter or daughters shall die leaving issue then I direct that the sum of one thousand pounds left to such daughters respectively shall go and be divided amongst the children of such of my said daughters share and share alike and that the same shall not in anywise be liable to the control or engagements or go to the use of any husbands whom my said daughters may take without consent as aforesaid. And in case any or either of my daughters shall die without being married with consent as aforesaid and without leaving lawful issue I direct that the principal sum left to the daughter or daughters so dying shall go to her or their surviving brothers and sisters share and share alike."

The testator bequeathed to his three sons after their mother's death the property, money, and goods of which he had bequeathed her the interest and use during her life, save the parts thereof which he had thereinbefore otherwise specifically bequeathed or disposed of, and appointed his wife executrix, and William Walsh M'Neill executor.

The testator died on January 23rd, 1837, leaving his widow and five children surviving, namely, three daughters, Theodora, Eliza, and Jane, and two sons, Moore, and Edward Thomas; and probate of his will was granted to the executrix and executor on March 23rd, 1837. Theodora Hill died in 1842, and Jane Hill died in 1848, both intestate and unmarried. Shortly after the death of the testator the sum of £1000 was set apart to represent the legacy of £1000 to Eliza Hill, and invested in the purchase of a judgment, which became vested in Henry FitzGibbon, K.C., Recorder of Belfast, as trustee. Eliza Hill survived her brothers and sisters, and died unmarried on January 29th, 1906, having by her will, dated January 24th, 1906, bequeathed

M. R. 1907.

FITZGIBBON v. M'NEILL.

the said sum of £1000 to Trevor Hill M'Neill and the said Henry FitzGibbon in equal shares, and appointed J. A. Denning her executor, by whom her will was duly proved.

A question having arisen whether Eliza Hill had power to dispose of the said sum of £1000, this summons was taken out by the said Henry FitzGibbon as plaintiff. The defendants were the said Trevor Hill M'Neill, one of the beneficiaries under the will of Eliza M'Neill; the Provincial Bank of Ireland, Limited, which claimed to have a charge on the said sum of £1000, in the event of its being held that the testator's son, Moore Hill, took any interest therein; and Margaret Hill as representing the next-of-kin of Edward Thomas Hill. The Court appointed the Provincial Bank to represent the residuary legatees of the testator, and Margaret Hill to represent the next-of-kin of the testator.

Arthur V. Matheson, for the plaintiff.

C. L. Matheson, K.C., for the defendant M'Neill :—

Eliza Hill, in the events which happened, took an absolute interest in the £1000 bequeathed to her by the testator. There is, in the first instance, an absolute gift to his three daughters, Theodora, Eliza, and Jane, respectively, at their mother's death; certain restrictions are then imposed on the enjoyment of the gift, namely, that if a daughter had married previously without consent of the executors, or was unmarried at her mother's death, she was only to get the income of the £1000 until she married with consent, and that if any daughter died without having married with consent, and without leaving issue, the principal sum left to her should go to her surviving brothers and sisters. These restrictions do not provide for the event which happened in the case of Eliza Hill, namely, of one of the daughters surviving all her brothers and sisters, and dying unmarried; and, there being no restriction applicable to that event, the absolute gift of the £1000 remains unaffected, and Eliza Hill was absolutely entitled to it at her death. The principle is well settled that where there is in the first instance an absolute gift, and then trusts or restrictions are imposed on that gift, or limitations modifying it follow, so far as

these trusts, restrictions, or limitations do not extend, the absolute gift remains: *Lassence* v. *Tierney* (1); *Kellett* v. *Kellett* (2); *Hancock* v. *Watson* (3); *Olphert* v. *Olphert* (4).

Garrett W. Walker, *K.C.*, for the defendants, the Provincial Bank:—

In the events which happened Eliza Hill only took a life interest in the £1000; to make the gift to her absolute a full stop must be put in the middle of the sentence, viz., after the words "one thousand pounds." Marriage with consent before the death of the mother was made a condition of the gift to the daughter. The surviving daughter did not marry, and there is no one to take under the gift over, and it falls into the residue; or, if not, there is an intestacy: *King* v. *Frost* (5); *Gompertz* v. *Gompertz* (6); *Kirkwood* v. *Kirkwood* (7).

(1) 1 Mac. & G. 551.
(2) L. R. 3 H. L. 160.
(3) [1902] A. C. 14.
(4) [1905] 1 I. R. 326.
(5) 15 A. C. 548.
(6) 2 Ph. 107.

(7) Unreported. November 19th, 20th, 1906. (1906 No. 683). John Kirkwood, the testator in this case, bequeathed to each of his three daughters, Eliza Anne, Mary, and Susannah Alicia Kirkwood, the sum of £2500 each out of his assets in the 3½ Government Stock or other assets he might die possessed of, the same to be placed in proper and perfect security for their purposes and support, the interest thereof to be paid to them or any of them yearly or half-yearly as they might require, those sums, say £7500, to be placed as soon as possible at interest after his decease. If any of his aforenamed daughters should marry or contract marriage without the consent of his executors thereafter to be named, they or any of them will only be entitled to the one-half of the sum of £2,500, say £1250, and in case any of his aforesaid daughters should die previous to marriage, the sums so willed shall revert to the survivor or survivors, share and share alike, with a like share to his son Joseph. He further willed that if any of his aforesaid daughters should be married previously to the death of any of his daughters, she should not participate in any portion of the sum so willed, but he gave power to the party, if disposed to do so, to will a like portion to any married sister if the case be so to the same extent as the unmarried, with his son Joseph. The testator bequeathed to his son Joseph Kirkwood the remainder of all property he might die possessed of, on the terms and conditions in the said will mentioned, and appointed Tobias Kirkwood, his son Joseph Kirkwood, and his wife Eliza Kirkwood, executors of his will.

Eliza Anne Kirkwood and Mary Kirkwood married and received their

M. R. 1907.

FITZGIBBON v. M'NEILL.

Littledale, K.C., for the defendant, Margaret Hill:—

There is no absolute gift here. It is conditional on—(*a*) marriage in the mother's lifetime with consent, or (*b*) marriage after the mother's death with consent. A daughter who did not marry got a life interest only; if she died in the mother's lifetime unmarried, or married without consent, she would have taken nothing. The gift does not vest during the life of a daughter if unmarried. If the £1000 was to come out of the corpus left to the wife for life, there is an express gift of this corpus to the residuary legatee; if not, it goes to the next-of-kin of the testator: *Dawson* v. *Oliver Massey* (1); *In re Browne's Will* (2); *Fitzgerald* v. *Byrne* (3); *Atkins* v. *Hiccocks* (4).

Matheson, K.C., in reply:—

The gift was absolute, though payment was postponed. There

legacies, and predeceased Susannah Alicia Kirkwood, who was still living, and eighty years of age, and unmarried. Joseph Kirkwood predeceased Susannah Alicia Kirkwood, leaving three daughters, to whom he bequeathed all his property. Susannah Kirkwood being desirous of disposing of her property by will, took out a summons to determine—(1) whether in the events which had happened she was absolutely entitled to the sum of £2532 6*s.* 8*d.* New Consols, which represented the legacy of £2500 provided for by the said will; (2) if not, who will be entitled to the said sum in the event of her death previous to marriage and in what shares. The daughters of Joseph Kirkwood were made defendants.

John Donaldson, for the plaintiff, contended that there was an absolute gift of £2500 to the plaintiff in the first instance; that the gift over did not take effect, as Joseph had predeceased the plaintiff; and that she was absolutely entitled to it, provided she died unmarried; and that the fact that Joseph was made residuary legatee did not affect the question.

Garrett W. Walker, K.C., for the defendants, contended that there was no absolute gift to each daughter in the first instance; that the gift over to Joseph was not conditional on his surviving, and was not affected by the fact that there was no daughter surviving, and, even if that were so, that the residuary legatee would take.

The following authorities were cited:—*Eaton* v. *Barker* (2 Coll. 124); *Jones* v. *Davies* (28 W. R. 455); *Crozier* v. *Crozier* (L. R. 15 Eq. 282); *Monck*

(1) 2 Ch. D. 753.
(2) 18 Ch. D. 61.
(3) [1899] 2 I. R. 665.
(4) 1 Atk. 500.

is no express gift to a daughter marrying with consent after the mother's death, except under the first words of the clause. If the gift was absolute, there was no need to provide expressly for the case of marriage with consent. The words of the gift over show that there was a gift to each daughter of £1000, which was kept apart. The cases cited are distinguishable.

THE MASTER OF THE ROLLS:— March 27.

It is easy to state the principle laid down in *Lassence* v. *Tierney* (1) as approved by the House of Lords in *Kellett* v. *Kellett* (2) and in numerous other cases, including the comparatively recent case of *Hancock* v. *Watson* (3). It is, however, very difficult to apply the principle to the ever varying language in which individual testators endeavour to express, or perhaps I should say conceal, their real intention. Reported cases are only

v. *Croker* ([1899] 1 I. R. 56); *Olphert* v. *Olphert* ([1903] 1 I. R. 326); *King* v. *Frost* (15 A. C. 548); *O'Mahony* v. *Burdett* (L. R. 7 H. L. 388); *Gompertz* v. *Gompertz* (2 Ph. 107); *In re Bates* (11 W. R. 768); *Hurst* v. *Hurst* (21 Ch. D. 294); Theobald on Wills (5th ed.), pp. 627, 628.]

THE MASTER OF THE ROLLS held that the gift was absolute in the first instance, but that in the event of the plaintiff dying unmarried, it went to the personal representative of Joseph under the gift over, it not being a condition of the gift to him that he should survive, following *In re Bates* (11 W. R. 768) in this respect.

The following order was made:—

> "THE JUDGE doth declare that upon the true construction of the will of John Kirkwood, deceased, the plaintiff is not in the events which have happened absolutely and indefeasibly entitled to the sum of £2532 6*s.* 8*d.* New Consols, representing the legacy of £2500 provided for her by said will; and the Judge doth declare that, in the event of the death of the said plaintiff previously to marriage, the personal representative of Joseph Kirkwood, deceased, will be entitled to same as part of the personal estate of the said Joseph Kirkwood."

Solicitors for the plaintiff: *Henry & Son.*
Solicitors for the defendants: *Carruthers & Gamble.*

(1) 1 Mac. & G. 551. (2) L. R. 3 H. L. 160. (3) [1902] A. C. 14.

M. R. 1907.

FITZGIBBON v. M'NEILL.

of value so far as they explain and elaborate the principle, and afford examples and illustrations of the way in which the principle has been applied in particular cases by eminent judges. Accordingly I do not intend to discuss all the cases cited during the argument, but I shall briefly refer to some of them. First in point of time comes *Scawin* v. *Watson* (1). This case was confirmed by Lord Cottenham, C., and is referred to by him in his judgment in *Lassence* v. *Tierney* (2). The case affords an example of the class of cases relied on by Mr. Walker and Mr. Littledale, in which, having regard to the general purport and effect of the will, the bequest in question was held not to amount to an absolute gift. But the case is also useful for the clear and concise statement of the general principle which concerns us in the present case. The Master of the Rolls (Lord Langdale) thus commences his judgment:—

> "In this case, as in all others of the same description, the question is, whether, having regard to the general purport and effect of the will, the words import an absolute gift modified only by certain restrictions, so that the first absolute gift may have its full effect in every event to which the restrictions are inapplicable, or whether the effect is to give a restricted or limited interest only, so as not to be affected or enlarged by any failure of the subsequent limitations."

It would be mere affectation to dwell upon the decision in *Lassence* v. *Tierney* (3) itself. I only read one sentence which was properly cited by Mr. Littledale—

> "In every case, therefore, the question must be one of construction, and, except for the purposes of such construction, very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate, is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift."

I now come to the case of *Olphert* v. *Olphert* (4), a decision of Sir Andrew Porter, M.R. In some respects the case bears a resemblance to the present case.

(1) 10 Beav. 200.
(2) 1 Mac. & G. 562.
(3) 1 Mac. & G. 551.
(4) [1903] 1 I. R. 326.

Let me read the head-note, which correctly indicates the facts:

"A testator bequeathed to each of his four unmarried daughters £10,000 New 3½ per cent. Government Stock, to be paid on marriage; and £20,000 Old 3½ per cent. Government Stock, to be settled on marriage strictly on each daughter, and on her demise on her lawful issue; and in case any of his four daughters should die without leaving lawful issue, who should attain the age of twenty-one or get married, then her £20,000 Old 3½ per cent. Stock was to be divided between the survivors of his four daughters. The longest liver of the four daughters was a widow, aged eighty-one, without children. On her marriage a settlement was executed, the ultimate limitation of which was to the persons who, by virtue of the will, should be entitled to the same."

Sir Andrew Porter discusses the authorities exhaustively. I venture to quote two passages from his judgment. He says, at page 331:—

"The question then, is, whether, in the will of Robert Fannin there is or is not a gift of the £20,000 to each of testator's daughters, with a superadded direction for its settlement on her marriage. Inasmuch as these directions do not, in the events which have happened, cover the whole ground, there is either an absolute interest in Mrs. Vereker under the original gift, or the fund will, after her death, sink into the residue. The latter contention must prevail if Mrs. Vereker took nothing in the fund beyond her life estate. No other point was greatly pressed: although Serjeant Dodd, for Mrs. Vereker, did contend that she might be considered as herself the 'survivor' within the meaning of the clause I have read, the case rested on the other view; and indeed, since *King* v. *Frost* (15 A. C. 548), could hardly be treated otherwise. A person is not, and cannot with propriety be described as, his own survivor; and the contention that 'survivor' by itself means, in such contexts, the longest liver of individuals or of a class is no longer tenable."

No such argument was addressed to me here. Then, after referring to several cases, the Master of the Rolls says at page 336:—

"Then, is this provision for daughters an absolute gift with a direction to settle it in a particular way, which, in the existing state of things, does not exhaust the interest? In other words—the words of Lord Cottenham—the question is 'whether the testator intended an absolute gift with directions as to the mode in which the property so given should be enjoyed by the legatee, or that the gift

M. R. 1907.

FITZGIBBON v. M'NEILL.

should only take effect in the several cases and for several purposes specified.' "

On the construction of the will the Master of the Rolls held that, in the events which happened, Mrs. Vereker was absolutely entitled to the £20,000 stock bequeathed by her father's will, and put in settlement on her marriage.

I must now refer in some detail to the case of *Hancock* v. *Watson* (1), to which I alluded in the opening sentence of my judgment. That case is a most interesting one. Mr. Matheson (and I myself) made the suggestion that the case bore a resemblance to the present case, while Mr. Littledale and Mr. Walker said that they failed to see any likeness. In *Hancock* v. *Watson* (1) the facts are stated in the head-note to the report of the case in the House of Lords as follows :—

> " A will made in 1850 gave residuary personal estate to trustees in trust for the testator's wife for life and after her death (which happened) to be divided into five portions, which the testator allotted thus :—' To S. D.' (a married woman) ' I give two of such portions'; and directed that the two-fifths allotted to S. D. should remain in trust for her for life for her separate use, and from and after her decease, in trust for her children upon attaining twenty-five, if sons, or upon attaining twenty-one or marriage, if daughters; ' but in default of any such issue ' the two-fifths to be divided amongst the children of C., payable to sons at twenty-five or to daughters at twenty-one or marriage. S. D. died without having had a child. At her death there were children of C, daughters, who had all attained twenty-one or married. It was held, (1) that the whole gift over on the death of S. D. was void for remoteness, and could not be split into separate contingencies so as to be construed as a gift over on one contingency, that of S. D. having no child ; and (2) that upon the death of S. D. there was no intestacy as to the two-fifths, but that by reason of the invalidity of the gift over on her death, the original absolute gift prevailed, and upon her death passed to her representatives."

The head-note goes on :—

> " Where there is an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be."

(1) [1902] A. C. 14.

I may mention that Byrne, J. (before whom the originating summons came on for hearing), says, at page 490 of the report in [1901] 1 Ch. :—

> "I do not go into the cases that have been cited, because in each of them I could point out circumstances showing how they differ from the present case. I think this case is within the class of cases in which the absolute gift prevails when there is a failure of the trusts of the settlement on the children. I think in this case there is no intestacy."

The judgments of the Court of Appeal will repay perusal. I remark, in passing, that Lord Alverstone, L.C.J., adopts the rule laid down by North, J., in *Cooke* v. *Cooke* (1)—a case of appointment under a power—namely, that where there is an absolute gift followed by an attempt to limit the effect of that gift, and this limitation for some reason cannot take effect, the original gift will take effect. I also advert to the judgment of Vaughan Williams, L.J., who refers to *Lassence* v. *Tierney* (2) and *Gompertz* v. *Gompertz* (3). He says at page 498 :—

> "I only wish to say a word upon two cases that were cited. In *Lassence* v. *Tierney* (1 Mac. & G. 551) there was no gift except the gift which was constituted by the description of the mode of enjoyment, and that was the ground of the decision. In *Gompertz* v. *Gompertz* (2 Ph. 107) it is quite true there were words which were amply strong enough to constitute an absolute gift, and I do not know, so far as the provisions in the testator's subsequent directions were concerned, that they were any more antagonistic to an absolute gift than the provisions are in the present case. But the ground of the decision there was, not that the absolute gift was negatived or cut down by the provisions which followed, but that upon the words in which those provisions were embodied there was not merely a direction as to the mode in which the original gift was to be enjoyed, but a diminution of the original gift."

The decision of the Court of Appeal was affirmed in the House of Lords (4). Lord Davey says at page 22 :—

> "The appellants' second point is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next-of-kin of the

(1) 38 Ch. D. 208.
(2) 1 Mac. & G. 551.
(3) 2 Ph. 107.
(4) [1902] A. C. 14.

M. R.
1907.

FITZGIBBON
v.
M'NEILL.

testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either for lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1 Mac. & G. 551), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event."

There the testator's wife was entitled to a life interest in the property. In the present case the testator's wife was also entitled to a life interest in the property. In that case a share, viz., two-fifths of the residue, was, in the first instance, allotted to Susan Drake, subject to the life interest of her mother. Here the three sums of one thousand pounds bequeathed to each of the testator's daughters, Theodora, Eliza, and Jane, are, in my opinion, as clearly and absolutely set apart in the first instance, as between the legatees and the estate, as were the two-fifths of the residue in *Hancock* v. *Watson* (1).

Lord Davey, in his judgment (immediately after the passage I have just read), says:—

> "In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Drake was in terms an absolute gift to her. The testator uses the words 'I give,' and speaks of the shares subsequently as 'allotted' to her."

In this case the testator used the words "I bequeath," and subsequently speaks of "the sum of one thousand pounds *left to such daughters* respectively"; and, again, uses the language, "the *principal sum left to the daughter* or daughters so dying."

I decide that the legacy of one thousand pounds to Eliza Hill was an absolute gift in the first instance as between the legatee

(1) [1902] A. C. 14.

and the estate. I decide that, not by arbitrarily putting a full stop immediately after the words "one thousand pounds"—nothing of the kind. It was urged by Mr. Littledale that the basis of Mr. Matheson's argument rested on there being a full stop put there. I did not so understand Mr. Matheson, and apparently he did not so understand himself. At all events, my decision is based, as Lord Langdale, M.R., said it should be based, and as it is manifest a decision should be based, not on the presence or absence of a full stop after the words I have mentioned, but having regard to the general purport and effect of the entire will. I further decide that this case comes within the class of cases in which, on the true construction of the will, the gift being absolute in the first instance has not been cut down or modified to such an extent as to prevent it taking effect, in the events which have happened, by the trusts, limitations, and provisions engrafted upon it. Let me read the whole clause:—[THE MASTER OF THE ROLLS read the clause]. Mr. Littledale contended that the benefit to the legatee was to be measured by the words "to be paid." That contention cannot, in my opinion, succeed. Subject to the mother's life interest the testator gave an absolute legacy of one thousand pounds to each of his three daughters. As the mother was to have a life interest, payment of these legacies could not be made till after her death; so, after setting apart the legacies, he provides for the date of payment. The words, "provided they shall have been previously married," do not make the legacy conditional on marriage. It is a direction as regards the payment of a legacy already given—a restriction upon the enjoyment of the gift, and not a condition of the gift. Then come the words:—"But in case my said daughters or either of them shall not have been previously married, or if such marriage or marriages shall have been without consent as aforesaid, then I direct that my said daughters so unmarried, or marrying without such consent, shall only have and receive the interest of the said respective sums of one thousand pounds during their respective natural lives, or until their respective marriages with consent of my surviving executor, such interest to be paid to my said daughters themselves and upon their own receipts, and not to be liable to the control or engagements of any husband taken without consent as aforesaid." During the argument Mr. Matheson

M. R. 1907.

FitzGibbon v. M'Neill.

relied on the wording of that clause, and the fact that an event which the testator manifestly had in view, namely, marriage with consent after the mother's death, on the happening of which the legacy was to be paid over, was not provided for at all. The authorities show that that is one of the circumstances to be considered, it is part of the context, which enables the Court to hold that the gift was absolute in the first instance. Here the testator does not say that on her marriage with consent after her mother's death the daughter is to be paid her legacy of £1000. Doubtless, the law would imply that she was to be paid in that event; but, literally read, the words mean that she is to get the interest till marriage, and there is no express provision that she is to get capital or interest after that date. Giving the testator credit for ordinary knowledge of the world and ordinary commonsense, the reason why the will is worded in that way is because she takes by virtue of an absolute gift in the first instance, and, if so, the will then becomes clear. There is an absolute gift with a direction as to payment of interest only in certain events, and when a certain other event happens she is to be paid the whole sum. The testator goes on :—"And I further will that in case any or either of my daughters shall marry without such consent and that such daughter or daughters shall die leaving issue then I direct that the sum of one thousand pounds left to such daughters respectively shall go and be divided amongst the children of such of my said daughters share and share alike and that the same shall not in anywise be liable to the control or engagements or go to the use of any husband whom my daughters may take without consent as aforesaid." That event did not happen. Then comes the last event in which the gift is to fail to have effect :—"And in case any or either of my daughters shall die without being married with consent as aforesaid and without leaving lawful issue I direct that the principal sum left to the daughter or daughters so dying shall go to her or their surviving brothers and sisters share and share alike." Eliza Hill died without having been married, and was herself the sole survivor. The result is that the directions, restrictions, and limitations annexed to the original gift have come to an end. They do not "cover the whole ground," and the absolute gift remains and must be given effect to. The case is one which was properly

brought before the Court, and all parties will be declared entitled to their costs. I answer the first question "Yes." It is not necessary to answer the other questions.

M. R. 1907.

FITZGIBBON v. M'NEILL.

Solicitors: *Elliott M'Neill*; *W. M'N. Williams*; *John Tweedy*; *W. G. Armstrong & Son.*

W. L.

IN THE MATTER OF THE ESTATE OF MARIA L. EYRE POWELL.

Wylie, J. 1907.

Nov. 5.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3—*Vendor tenant for life—Death of, prior to completion of sale—Bonus.*

Where a tenant for life, who had entered into agreements for sale to the occupying tenants under the provisions of the Irish Land Act, 1903, died before the Estates Commissioners had declared the lands comprised in the originating application fit to be regarded as a separate estate for the purposes of the said Act, and the proceedings for sale were continued in the name of the successor in title:—

Held, that the bonus was payable to the personal representative of the deceased tenant for life.

QUESTION arising on allocation. Maria L. Eyre Powell, being entitled as tenant for life to certain lands, entered into agreements for the sale thereof to the occupying tenants under the provisions of the Irish Land Act, 1903. The originating application was lodged on the 23rd November, 1904, and the purchase agreements on the 22nd December following. On the 7th March, 1907, the Estates Commissioners made an order declaring the lands comprised in the originating application fit to be regarded as a separate estate for the purposes of the Irish Land Act, 1903. On the 11th February, 1907, Maria L. Eyre Powell died, having by her will appointed R. A. MacNamara her sole executor. On the 29th April, 1907, an order was made continuing the proceedings in the name of Thomas V. Powell, as successor in title to the deceased tenant for life. The question now arose as to who was entitled to receive the percentage mentioned in sect. 48 of the Irish Land Act, 1903, and sect. 3 of the Irish Land Act, 1904?

Wylie, J. 1907.

In re POWELL'S ESTATE.

Serjeant O'Connor, K.C., and *Hugh Kennedy*, for the executor of the tenant for life:—

The question is, Who is the vendor? The vendor is the tenant for life, who entered into the agreements for sale. A tenant for life is capable of entering into a contract for sale which is binding on the settled lands: Settled Land Act, 1882, s. 31 (1) and (2); *In re Cleveland's Settled Estates* (1). The agreements were valid and binding contracts at the date of the death of the tenant for life: *In re Doyle's Estate* (2); *In re Armstrong's Estate* (3). The sale has been completed, and conversion is regarded as having taken place as from the date of the agreements: *Lawes* v. *Bennett* (4); *Weeding* v. *Weeding* (5); *Townley* v. *Bedwell* (6); *In re Isaacs* (7); *Regent's Canal Co.* v. *Ware* (8). Accordingly, the sale relates back to the date of the original agreements: *In re Meade's Estate* (9); *R.* (*Earl Fitzwilliam*) v. *Wicklow County Council* (10). The time of sale is the date of the original agreements: *In re Lyle's Estate* (11). *In re Sherlock's Estate* (12) is not an authority here, as it was decided on the ground of estoppel. The bonus is accordingly payable to the executor of the tenant for life.

W. M. Jellett, K.C., and *G. FitzGibbon*, for the remainderman:

In order to ascertain who is the vendor, it is necessary to see who was the owner at the time when there was a completed contract. In a case under the Land Purchase Acts there is not even a complete contract till the advance has been made: *per* Walker, L J., *In re Sherlock's Estate* (12). Under sect. 22 of the Land Law (Ir.) Act, 1887, specific performance cannot be decreed until the application for an advance has been sanctioned by the Land Commission. At the date of the death of the tenant for life there was not an enforceable contract. The bonus should be paid to the remainderman, who was the person entitled at the time the contract was completed. Section 17 of the Act of 1903 supports this view. The section emphasizes the distinction in point of time between the right to sell and the right to receive the bonus.

(1) [1902] 2 Ch. D. at p. 353.
(2) [1907] 1 I. R. 204.
(3) 41 Ir. L. T. R. 15.
(4) 1 Cox Ch. C. 157.
(5) 1 J. & H. 424.
(6) 14 Vesey, 591.
(7) [1894] 3 Ch. D. 506.
(8) 23 Beav. 575.
(9) 40 Ir. L. T. R. 124.
(10) *Ibid.* 180.
(11) 41 Ir. L. T. R. 112.
(12) [1899] 2 I. R. 591, 600.

WYLIE, J.:—

This case has been very fully argued; and as I have no doubt on the point in my own mind, I do not think it is necessary to reserve judgment.

The question is: Who is entitled to the bonus payable under sect. 48 of the Irish Land Act, 1903, and sect. 3 of the Act of 1904? The facts are shortly as follows:—Mrs. Powell, as tenant for life, entered into agreements with her tenants for the sale to them of their holdings under the provisions of the Act of 1903, and, at the time of her death, these agreements had been carried on to the stage when the only thing that remained to be done in order to complete the sale was for the Estates Commissioners to declare the lands fit to be regarded as a separate estate. Now, I am dealing with a case where the sale has been completed. It is a sale effected by the agreements entered into by Mrs. Powell, as tenant for life, under powers conferred on her as such tenant for life. That is the sale that has now been completed and no other. That being so, who is the vendor to whom the bonus is now payable?

I have been referred to sect. 17 by Mr. Jellett. But it seems to me that that section, if it has any bearing on the case, is strongly against his contention, because it provides that where a person can show a *prima facie* right to sell, the Estates Commissioners can vest the lands, although it may turn out that that person is not the proper owner at all. Once the parties have agreed to sell, and taken the proper steps to give the Estates Commissioners jurisdiction in the matter, it rests with them to carry out the agreements, without the intervention either of the vendor or the tenants.

In this case I have no doubt that the vendor was Mrs. Powell, who sold as tenant for life. Accordingly she was the only person to whom I could pay the bonus under sect. 48 of the Act of 1903, free, under sect. 3 of the Act of 1904, from all charges. The money will, accordingly, be paid to her executor.

Solicitor for the executor: *R. A. MacNamara*, in person.
Solicitors for the remainderman: *Moore, Keily, & Lloyd.*

J. E. W.

Wylie, J.
1907.
Nov. 12.

IN THE MATTER OF THE ESTATE OF THOMAS F. RUTTLEDGE

Land Purchase Acts—Tenant, pending the matter, remaining in possession after dismissal of petition—Tenancy, when created—"Former tenant"—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 53 (1).

Where an agreement for the sale of a holding under the Land Purchase Acts had been entered into, and it appeared that the estate of which the holding formed a part had been subject to an absolute order for sale which had been dismissed in 1902, and that the tenant, who since 1900 had been a tenant pending the matter in the Land Judge's Court, had, on the dismissal of the petition, remained on in possession of the holding paying the same rent: on a question arising as to the amount of the advance that could be made:—

Held, (1) that the tenancy was one created after the 1st January, 1901; but (2) that the tenant was a former tenant, within the meaning of the proviso to section 53 (1) of the Irish Land Act, 1903.

QUESTIONS OF LAW submitted by the Estates Commissioners for the decision of the Judicial Commissioner, pursuant to section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—Martin May had signed an agreement dated 9th January, 1905, for the purchase of his holding, which comprised 107A. 3R. 21P. of the lands of Ballyargadaun, county Mayo, held at a rent of £120, and had applied for an advance of £2615. The holding was situated in an administrative county, which comprised a congested districts county. The holding was formerly comprised in the estate of C. B. Jennings, owner, J. E. Chapman, petitioner, which was for sale in the Land Judge's Court. By lease dated 26th May, 1900, the Land Judge let the holding to Martin May, the present tenant purchaser, for seven years from 25th March, 1900, pending the matter of Jennings' estate, at the yearly rent of £120. By order dated 12th May, 1902, the Land Judge dismissed the petition for sale in Jennings' estate as regards the lands then unsold, which included Martin May's holding. By indenture, dated 18th August, 1902, Mary

E. Jennings, in whom all the estate and interest of C. B. Jennings were then vested, conveyed the lands comprised in Martin May's holding, with other land, to the vendor absolutely.

On the petition for sale in Jennings' estate being dismissed, Martin May remained in possession of the holding, and continued to pay the rent of £120 per annum to Mary E. Jennings, and subsequently to the vendor without any new agreement; the contention of the vendor was that no tenancy was created after the 1st January, 1901, and if it should be held that the present tenancy of Martin May commenced on or subsequent to the determination of the tenant's former lease by the dismissal of the petition for sale in Jennings' estate on the 12th May, 1902, that Martin May was a former tenant under the said lease of 26th May, 1900, and, consequently, that the provisions of section 53 (1) of the Irish Land Act, 1903, did not apply to his holding.

The following questions of law were submitted :—

1. Was the tenancy of Martin May in the said holding a tenancy created after the 1st of January, 1901? and in the event of the answer being in the affirmative,

2. Was Martin May, a "former tenant" within the meaning of section 53 (1) of the Irish Land Act, 1903, and as such exempt from its provisions as to the limitation of the amount of the advance that could be made to him for the purchase of his holding.

Herbert Wilson, K.C., for Martin May :—

Taking the second question first, the general effect of section 53 of the Act of 1903 is to put a limitation on advances in the case of tenancies coming within its purview. Section 53 (1) presupposes the existence of a former tenancy in a holding. Even assuming that Martin May's tenancy was determined on the dismissal of the petition, and that his tenancy was one created after the 1st day of January, 1901, he is not debarred from getting an advance in excess of £500, as he is a former tenant within the meaning of the proviso to sect. 53 (1). The term "former tenant" in the proviso cannot include the class of persons coming within section 2 (1) *d*, as, first, the latter section is confined to parcels of

Wylie, J. 1907.

In re Ruttledge's Estate.

land, not tenanted land; and, secondly, the limitation on advances under that section is fixed by the section itself. Accordingly, if this class of persons is excluded from the term "former tenant," it must be assumed that it was intended that the proviso should include cases such as that of Martin May. As to question 1: On the dismissal of the petition in Jennings' estate there was a clear intention by the owner to deal with Martin May as holding under the tenancy created in the Land Judge's matter as in *Roulston* v. *Caldwell* (1): Martin May was a tenant at will, and by the acceptance of the same rent from him there was an adoption by the owner of the existing tenancy.

Dudley White, for the Treasury:—

With regard to the first question, the tenancy of Martin May was one created after the 1st January, 1901. On the dismissal of the petition he became a tenant from year to year where formerly he was a tenant at will. As to the second question, it was clearly intended that the proviso to sect. 53 (1) should cover the class of person coming within the provisions of sect. 2 (1) *d*. This is not the case of a former tenant within the meaning of the proviso.

Wylie, J.:—

I have no doubt as to my answer to the first question. When the petition in the Land Judge's matter was dismissed in 1902, it seems to me that, on the facts as stated, from being a tenant at will, Martin May became a tenant from year to year. It was, therefore, a tenancy created after the 1st January, 1901. My answer is in the affirmative.

As to the second question, I am quite clear that at the date of the purchase agreement Martin May was a former tenant, within the meaning of the proviso to sect. 53 (1). My answer to this question is, accordingly, in the affirmative.

Solicitors for Martin May: *Whitney & Moore.*
Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

(1) [1895] 2 I. R. 136.

RICHMOND DISTRICT ASYLUM BOARD *v.* THE KING (1).

Barton, J.
1905.

Jan. 12, 13, 25.

Appeal.
Dec. 18, 21.

Criminal lunatic, maintenance of—Soldiers and sailors sent to District Lunatic Asylum in Ireland as dangerous lunatics—Lunacy (Ireland) Act, 1901, sections 3 (1) and 6.

Soldiers and sailors confined in District Lunatic Asylums in Ireland, who have been sent there as dangerous lunatics under section 91 (2) of the Army Act, 1881, or section 3 of the Naval Enlistment Act, 1884, come within the definition of "criminal lunatics" in the Lunacy (Ireland) Act, 1901, section 6, and the expenses of their maintenance in a District Lunatic Asylum in Ireland are to be defrayed out of moneys provided by Parliament.

PETITION OF RIGHT.

This was the hearing of a Petition of Right in which the suppliants were the Right Honourable the Lord Mayor, Aldermen, and Burgesses of the City of Dublin, the County Council of the County of Dublin, the County Council of the County of Wicklow, and the County Council of the County of Louth, being the Joint Councils constituting the Richmond Asylum District, acting through the Joint Committee of Management of the Richmond District Lunatic Asylum. The material portions of the Petition were as follows:—

1. That, by the Army Act, 1881, section 91, it is provided that a Secretary of State, where it appears to him that any soldier of the Regular Forces is a dangerous lunatic, and is in such a state of health as not to be liable to suffer bodily or mental injury by his removal, may, by order, under his hand or under the hand of an Under-Secretary of State, send such soldier to an asylum, registered hospital, licensed house,

(1) The report of this case has been unavoidably delayed till now owing to the retirement from the Reports of Messrs. D. M'Carthy Mahony and G. Y. Dixon, on their appointment as Examiners to the Irish Land Commission. The present report has been prepared from papers supplied by them to Mr. M'Grath and the Editor.

Barton, J. 1905.

RICHMOND ASYLUM BOARD v. THE KING.

or other place in which pauper lunatics can be legally confined, and for the purpose of the said order, the parish or union to which, under the statutes for the time being in force, he appears, from the statements in his attestation paper and other available information, to be chargeable, shall be deemed to be the parish or union from which such soldier is sent, and that in case of any such lunatic who is liable to be delivered at a workhouse in Ireland at which persons settled in the said parish are received, a Secretary of State may, by order under his hand, send such lunatic to the asylum of the district in which such parish is situate, and that such order shall be of the same effect as a warrant under the hands and seals of two Justices, given under the provisions of the 10th section of the Act of 30 & 31 Vict. c. 118; and by the Army Act, 1899, it is provided that any officer deputed by a Secretary of State for the purpose may act as aforesaid in the place of a Secretary of State.

2. That, by section 3 of the Lunacy (Ireland) Act, 1901, it is further provided that (subject to the provisions of section 16 of the Lunatic Asylums (Ireland) Act, 1875, which is extended by the said section 3 to a criminal lunatic confined in any District Lunatic Asylum, and to any person confined therein under section 10 of the Lunacy (Ireland) Act, 1867), all expenses incurred in relation to a criminal lunatic confined in a District Lunatic Asylum, and all expenses of removing any such lunatic from a prison or the Central Asylum for criminal lunatics to a District Lunatic Asylum, shall be calculated in accordance with regulations to be made by the Lord Lieutenant, with the approval of the Treasury.

3. That, by section 6 of the said Lunacy (Ireland) Act, 1901, the expression, "criminal lunatic" in the said Act is defined to mean (*inter alia*) any person whom the Lord Lieutenant or a Secretary of State for War or the Admiralty has, in pursuance of any Act, directed to be removed to an asylum or other place for the reception of insane persons.

4. That, in pursuance of the Act or Acts mentioned in the first paragraph hereof, a Secretary of State, or an Under-Secretary of State, or a person deputed for the purpose by the

Secretary of State, has at various dates directed, by order under his hand, the removal to the said Richmond District Lunatic Asylum of the persons whose names are set forth in the first schedule hereto; and that the persons whose names are set forth in the first part of the said schedule were accordingly maintained in the said Asylum during the year ending the 31st March, 1903, and the persons whose names are set forth in the second part of the said schedule were maintained therein during the year ending the 31st March, 1904.

5. That the expenses incurred in relation to the persons mentioned in the schedule referred to in the preceding paragraph hereof have been calculated in accordance with regulations made by the Lord Lieutenant with the approval of the Treasury, and in accordance with the provisions of section 3 of the said Lunacy (Ireland) Act, 1901, and amount for the year ending 31st March, 1903, to the sum of £820 0*s.* 5*d.*, and to the sum of £798 9*s.* 4*d.* for the year ending the 31st March, 1904, the said two sums making a total of £1618 9*s.* 9*d.*

6. That no part of the said sum of £1618 9*s.* 9*d.* has been paid to your suppliants, and the ground alleged for refusing such payment, and for the refusal of the proper officer to sign the certificate for such payment, is that none of the said persons come within the definition of "criminal lunatic" in the sixth section of the said Lunacy (Ireland) Act, 1901, and the said sum of £1618 9*s.* 9*d.* is now due and owing to your suppliants in respect of the maintenance in the said District Lunatic Asylum up to the 31st March, 1904, of the persons hereinbefore mentioned, and your suppliants, therefore, pray payment of the said sum together with the costs of this Petition, and further pray that it may be declared that the expression "criminal lunatic" in the said section 6 of the Lunacy (Ireland) Act, 1901, includes persons ordered by a Secretary of State, or an Under-Secretary of State, or anyone deputed by a Secretary of State for the purpose under the statutes mentioned in paragraph 1 hereof, to be confined in the said District Lunatic Asylum, and that all expenses that may henceforth be incurred in relation to such persons so ordered to be confined, and so confined, in the said District Lunatic Asylum, and all expenses

Barton, J. 1905.

RICHMOND ASYLUM BOARD v. THE KING.

of removing any such lunatic from a prison, or the Central Asylum for criminal lunatics, to the said District Lunatic Asylum, are properly to be defrayed and payable to your suppliants, after the said first-mentioned expenses shall have been calculated in accordance with the provisions of the said section 3 of the Lunacy (Ireland) Act, 1901, out of moneys provided by Parliament.

The Attorney-General for Ireland, on behalf of His Majesty the King, filed an answer and plea as follows:—

1. That he admits the contents of the statute referred to in paragraphs 1 and 2 of the petition, and for greater certainty begs to refer to the same when produced for proof of the contents thereof.

2. That he admits the definition of "criminal lunatic" set forth in paragraph 3 of the petition as defined by the 6th section of the Lunacy (Ireland) Act, 1901, but he will submit and contend that the term "criminal lunatic" as defined by the said last-mentioned Act only applies to a lunatic who has committed a crime, but not to persons directed to be removed to a district lunatic asylum in pursuance of an order of a Secretary of State, or a person deputed for that purpose by the Secretary of State, under the provisions contained in the Army Act, 1881, section 91.

3. That in reply to the 4th paragraph of the petition he does not admit that the persons or any of them whose names are set forth in Parts I. and II. respectively of the schedule to the petition were removed to the said Richmond District Lunatic Asylum at various dates either by an order of a Secretary of State, or an Under-Secretary of State, or a person deputed for that purpose by the Secretary of State. He refers to such proof in support of the averments in the said 4th paragraph of the petition as the suppliants may adduce.

4. That in reply to paragraph 5 of the petition, he says that the regulations made by the Lord Lieutenant in accordance with section 3 of the Lunacy (Ireland) Act, 1901, with the approval of the Treasury, apply to "criminal lunatics," and not to lunatics other than "criminal lunatics"; and he will submit that the said

regulations do not apply to the persons mentioned in the said schedule to the petition, inasmuch as the said persons are not, nor are any of them, criminal lunatics.

5. That he admits that the said sum of £1618 9*s.* 9*d.* has not, nor has any part thereof, been paid to the suppliants; and he further admits that the ground for refusing to pay the said sum or any part thereof to the suppliants is correctly stated in paragraph 6 of the petition, except that he alleges the further ground that the said persons do not come within the scope of the said Act. The said sum of £1618 9*s.* 9*d.* is claimed for expenses of persons coming within the terms of the definition of "criminal lunatics" in the 6th section of the Lunacy (Ireland) Act, 1901, and not otherwise. The said persons do not, nor do any of them, come within the said definition of "criminal lunatics"; and the said sum is not, nor is any part thereof, due and owing to the suppliants by way of maintenance and expenses in respect of the said persons mentioned in the said schedule to the petition. Assuming that any sum is due in respect of the said persons or any of them, he has no means of determining the amount, and refers to such proof as the suppliants may produce in support of same. And he will further contend that the suppliants are not entitled to the declarations prayed for in paragraph 6 of the petition or any of them.

Gordon, K.C. (with him *Healy, K.C.*, and *Clancy*), for the suppliants:—

In the Lunacy (Ireland) Act, 1901 (1 Edw. 7, c. 17), the Legislature, in section 6, deliberately puts an interpretation upon the words "criminal lunatic" which includes soldier and sailors sent to district lunatic asylums by the Lord Lieutenant or a Secretary of State, or by the Admiralty. The section is evidently modelled upon section 16 of the English Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64). But the word "person" is substituted in the Irish Act for the word "prisoner," which was the word used in the English Act. It is reasonable to suppose that it was the intention of Parliament to recognize the special circumstances of Ireland, in which there is no law of settlement. Parliament evidently intended to prevent these heavy burdens being thrown upon the

Barton, J. 1905. RICHMOND ASYLUM BOARD v. THE KING.

rates of the few districts in Ireland in which soldiers are congregated. This injustice and inequality of burden could not arise in England, having regard to the law of settlement which prevails in that country. At all events, the words of the interpretation clause are quite clear, and the Court should give effect to them.

The Attorney-General (*The Right Hon. John Atkinson, K.C.*), *The Solicitor-General* (*J. H. Campbell, K.C.*) (with them *Cecil Atkinson* and *E. Coll*), for the respondent:—

The substitution of the word "person" for "prisoner" in the Irish Act is clearly a mistake or misprint. The history of the law in Ireland shows that dangerous lunatics committed to district lunatic asylums under 30 & 31 Vict. c. 118, sect. 10, are outside the Act of 1901. The Lord Lieutenant no longer has any authority as regards their removal on this charge. Parliament never intended to place military and naval dangerous lunatics upon a different footing. An examination of the other sections of the Act shows that many of them, and especially the proviso to the interpretation section itself, do not apply to these military and naval dangerous lunatics. The "removal" referred to in the section must mean removal from a jail. That is the meaning which the word has acquired in such a context. Parliament could not have intended to make such a large departure from the whole course of previous legislation by the change of a single word in an interpretation clause. A criminal lunatic means a lunatic charged with, or convicted of, crime. The word "person" in section 6 is plainly a clerical error for "prisoner"; and the Court should treat it as such, and correct the mistake.

Jan. 25.

BARTON, J.:—

This Petition of Right raises a question upon the construction of the Lunacy (Ireland) Act, 1901 (1 Edw. 7, c. 17). By sect. 3 (1) of that Act it was enacted that all expenses of maintenance of criminal lunatics confined in a district lunatic asylum in Ireland should in future be defrayed out of moneys provided by Parliament; and by section 6 the meaning in the Act of the expression "criminal lunatic" was defined. The question for decision is,

whether soldiers and sailors confined in district lunatic asylums in Ireland, who were sent there as dangerous lunatics under section 91 (2) of the Army Act of 1881 (44 & 45 Vict. c. 88), or section 3 of the Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), are "criminal lunatics" within the meaning of the Irish Act of 1901.

In *Mews* v. *The Queen* (1) a similar question arose in England, and turned largely upon the construction of an interpretation section. The question in that case was, whether the liability for the expenses of pauper prisoners removed to and confined in county lunatic asylums in England had been, by the English Prisons Act of 1877, transferred from local rates to moneys provided by Parliament. The King's Bench Division and Court of Appeal held not; but the House of Lords reversed their decision, proceeding mainly upon the words of the interpretation section of the Act. Lord Watson, at p. 346, referred to the interpretation section as enacted for the very purpose of explaining what the Legislature meant by the words "maintenance," "prisons," and "prisoners," as used in the other clauses of the Act. In the present case, where a similar question arises, the interpretation section must be construed and regarded in that way.

The statutory provisions, upon which this question turns, are capable of being briefly stated. The interpretation section, sect. 6, of the Lunacy (Ireland) Act, 1901, says that—"In this Act the expression 'criminal lunatic' means," among other persons, "any person whom the Lord Lieutenant or a Secretary of State or the Admiralty has, in pursuance of any Act, directed to be removed to an asylum or other place for the reception of insane persons." Under the Army Act, 1881, sect. 91 (1), it was enacted that "a Secretary of State may, if he think proper, on account of a soldier's lunacy, cause any soldier of the regular forces, on his discharge, and his wife and child, or any of them, to be sent to" a workhouse. Section 91 (2) provides that "a Secretary of State, where it appears to him that any such soldier is a dangerous lunatic, and is in such a state of health as not to be liable to suffer bodily or mental injury by his removal, may by order signified under his hand, or under

(1) 8 App. Cas. 339.

Barton, J. 1905.

RICHMOND ASYLUM BOARD v. THE KING.

the hand of an Under-Secretary, send such lunatic direct to an asylum," &c.; and by section 91 (5) it was further enacted that "in the case of any such lunatic who is liable to be delivered to a workhouse in Ireland, at which persons settled in the said union are received, a Secretary of State may, by order under his hand, send such soldier to the asylum of the district in which such union is situate, and such order shall be of the same effect as a warrant under the hands and seals of Justices given under the provisions of the 10th section of 30 & 31 Vict. c. 118." Section 3 of the Naval Enlistment Act, 1884, applies section 91 of the Army Act, 1881, to lunatic seamen, substituting the "Admiralty" for "Secretary of State." The Army Annual Act, 1899 (62 Vict. c. 3), which came into force upon April 27, 1899, by sect. 4 (1) adds to the words "Secretary of State" in section 91 of the Army Act, 1881, the words "or any officer deputed by him for the purpose," and in sub-section 2 repeats the words "or under the hand of an Under-Secretary." These are, I think, the provisions which bear directly upon the question at issue.

It seems to me that the words in the interpretation section of the Act of 1901, "person whom a Secretary of State or the Admiralty has, in pursuance of any Act, directed to be removed to an asylum," include a soldier or sailor whom the Secretary of State or the Admiralty has sent to an asylum. The word "send" when applied to a messenger means to order or direct him to go; when applied to a person towards whom coercion is to be used, it may be said to mean to order or direct such person to be taken, conveyed, moved, or removed. In sect. 91 (2) the conveyance of the person to be sent is spoken of as "removal." It seems to me that the section, understood in its natural meaning, extends to these lunatic soldiers and sailors. It was suggested that these words, "directed to be removed," may have acquired some settled meaning in the code which would render them inapplicable to these lunatic soldiers and sailors. Turning to the statutory provisions which I understand are admittedly covered by this interpretation clause, I find in the Army Act, 1881, sect. 130 (5), the words are "order the removal"; in the Naval Discipline Act, 1866, sect. 80, the words are "direct the removal." I do not think that these

references support the contention that the expression "directed to be removed" has become a term of art. It was also pointed out that some of these persons were sent by order under the hand of an Under-Secretary, and since April 27th, 1899, by a deputy appointed for the purpose by a Secretary of State. But the removal in those cases would appear upon the words of the statutes to be a statutory *factum per alium factum per se*.

Reliance was placed, on behalf of the Crown, upon the circumstance that certain other provisions in the Act of 1901 relating to criminal lunatics appear to have no application to these lunatic soldiers and sailors—for example, section 1, and the proviso to the interpretation section. But while the expression "criminal lunatic" whenever it occurs in the Act must bear one of the meanings attached to it by the interpretation section, particular sections may be restricted in their application to some of the various classes of persons mentioned in the interpretation clause. A proviso is frequently partial in its application. I dare say there may be other criminal lunatics to whom section 1 would not apply—*e.g.*, to soldiers and sailors sent to an asylum under the Army Act, 1881, sect. 130 (5), and the Naval Discipline Act, 1866, sect. 80. The proviso would not appear to be required in the case of the persons with whom this Petition is concerned, because when discharged from the asylum they would cease to be "confined" in it; and therefore, quite apart from the interpretation section, would cease to come within section 3 (1).

So far as the history of the law in Ireland is concerned, the Attorney-General showed very clearly that dangerous lunatics committed in Ireland under 30 & 31 Vict. c. 118, sect. 10, are outside the Act of 1901. The Lord Lieutenant has ceased to have any authority over their removal to, or discharge from, the district lunatic asylum. But that does not seem to me to affect the present case, because even if the dangerous lunatics who are soldiers and sailors may, after admission, be treated in the asylum in the same way as ordinary dangerous lunatics, they are none the less persons whom a Secretary of State or the Admiralty had directed to be removed to the asylum.

The provision in the English law which corresponds to sect. 3(1) of the Irish Act of 1901 is sect. 10 of the English Criminal

Barton, J. 1905. RICHMOND ASYLUM BOARD *v.* THE KING.

Lunatics Act, 1884; but in that Act the interpretation section, sect. 16, was framed so as to exclude the persons who are the subject of the present petition, because the word "prisoners" occurs in that Act instead of "persons," and the word "prisoners" is defined in terms which do not include these lunatic soldiers and sailors. The Irish Act substituted the word "persons" for "prisoners," thereby widening the scope of the meaning of "criminal lunatic." In the corresponding part of the interpretation section of the Criminal Lunatics Act, 1867 (30 Vict. c. 12, s. 2), the word "persons" had been used; but that was before the Army Act, 1881. Mr. Clancy suggested on behalf of the petitioner that the change was made in order to meet the anomalous circumstances which the absence of any law of settlement brings about in Ireland. The collection of soldiers in big cities and other military centres tends to throw upon a few localities burdens which in England, owing to the law of settlement, would be more justly and evenly distributed. As this inequality results from the exigencies of the public service, it may have afforded a reason for widening the interpretation clause in the Irish Act so as to include these persons. If that may have been the reason, the sufficiency of it would be for the Legislature, not for the court of construction. However, I do not attach much weight to this argument, which necessarily rests largely upon mere speculation. The question comes back to the words of the interpretation section understood in their ordinary meaning. After carefully considering every argument that was submitted on behalf of the Crown, I have come to the conclusion that these persons come within the interpretation section of the Act of 1901, understood in its plain and ordinary meaning, and that the suppliants' case has been made out.

W. M'G.

The Crown appealed from this decision to the Court of Appeal (1).

Appeal. 1905.

RICHMOND ASYLUM BOARD *v.* THE KING.

The Attorney-General (*The Right Hon. J. H. Campbell, K.C.*), *The Hon. Cecil Atkinson*, and *E. Coll*, for the Crown.

Gordon, K.C., *Healy, K.C.*, and *Clancy*, for the suppliants.

Dec. 18, 21.

THE LORD CHANCELLOR:—

Dec. 21.

The suppliants in this case, who form the Joint Councils constituting the Richmond Asylum district, acting through the Joint Committee of Management of the Richmond District Lunatic Asylum, claim payment of a sum of £1618 9*s.* 9*d.*, representing the expenses of the maintenance during the years 1903 and 1904 of a number of lunatic soldiers whose names are mentioned in the first and second schedules to the Petition of Right, and who had been directed to be sent to the Asylum by the Secretary of State under the provisions of the Army Act, 1881. It is not the case of the suppliants that any one of these soldiers had been a criminal lunatic in what may be called the popular sense of that term, or the sense of that term before the Act of 1901 was passed: for instance, in the definitions contained in the 8 & 9 Vict. c. 107, and the incorporated definition there from the 1 & 2 Geo. 4, c. 33. It is not disputed that such criminal lunatics in a district asylum should be maintained at the public expense, and the expenses incurred in relation to them be defrayed out of moneys provided by Parliament as mentioned in the 3rd section of the Lunacy (Ireland) Act, 1901.

There is, however, legislation under which a person who is a dangerous lunatic may be sent to and confined in a District Lunatic Asylum. The provisions relating to such persons are contained in 30 & 31 Vict. c. 118, s. 10.:—"Whenever any person shall be brought before any two Justices of any county, county of a city, county of a town, city or town, and it shall be proved to their satisfaction that such person was discovered and apprehended under circumstances denoting a derangement of mind, and

(1) Before THE LORD CHANCELLOR (the Right Hon. SAMUEL WALKER), and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

RICHMOND ASYLUM BOARD v. THE KING.

The Lord Chancellor.

a purpose of committing some crime for which, if committed, such person would be liable to be indicted, the said Justices shall call to their assistance the medical officer, or, if there be more than one, the nearest available medical officer, of the dispensary district in which they shall be at the time, and if there shall not be any such medical officer available, then the nearest available medical officer of any neighbouring dispensary district, who shall examine such person without fee or reward: and if such medical officer shall certify that such person is a dangerous lunatic, or a dangerous idiot, it shall be lawful for the said Justices by warrant under their hands and seals to direct that such person shall be taken to the lunatic asylum established either wholly or in part for the county, county of a city, or county of a town, in which he shall have been apprehended: and every such person shall remain under confinement in such asylum and be there maintained in like manner and subject to the same conditions as if such person had been removed from any gaol to such asylum by virtue of the warrant of the Lord Lieutenant under the provisions of the recited Act of the first year of Her present Majesty, chapter 27."

This only differs from the Act of 1 Vict. c. 27, recited in it, in this—that under the earlier Act the dangerous lunatic was first committed to gaol and afterwards removed to the District Asylum: and the Secretary of State when a soldier becomes a dangerous lunatic is authorized by the Army Act to use the powers contained in sect. 10 of the 30 & 31 Vict. c. 118, for the purpose of placing the soldier in the District Asylum; and the question is, Whether the soldiers placed in the District Asylum under these powers applicable to dangerous lunatics are to be paid for out of moneys provided by Parliament in the same manner as the other persons I have mentioned—admitted to be criminal lunatics who must be so paid for.

The section of the Army Act, 1881, under which the lunatic soldier is sent to the District Asylum is sect. 91, sub-sect. 5, which provides:—"In the case of any such lunatic who is liable to be delivered at a workhouse in Ireland at which persons settled in the said union are received, the Secretary of State may, by order under his hand, send such soldier to the asylum of the district in which such union is situate, and such order shall be of the same

effect as a warrant under the hands and seals of two justices given under the provisions of the 10th section of the Act of the 30th and 31st year of the reign of Her present Majesty, chapter 118."

The Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), provided by its 10th section that "all expenses incurred under this Act in relation to a criminal lunatic while detained in an asylum . . . shall be defrayed out of moneys provided by Parliament."

And "criminal lunatic" is defined by section 16 to mean:—(*a*) "Any person for whose safe custody during Her Majesty's pleasure Her Majesty or the Admiralty is authorized to give order; and (*b*) Any prisoner whom a Secretary of State or the Admiralty has in pursuance of any Act of Parliament directed to be removed to an asylum or other place for the reception of insane persons."

It is, and I assume it to be, quite clear that if there had been no change in the legislation the persons to whom the present Petition of Right relates would not be "criminal lunatics" within any definition that I am aware of, nor would their maintenance in a district asylum be payable out of moneys provided by Parliament. But the Lunacy (Ireland) Act, 1901, on which this whole case depends, has made a change. It provides by section 3:—"(1) Subject as in this section mentioned, all expenses incurred in relation to a criminal lunatic confined in a district lunatic asylum, and all expenses of removing any such lunatic from a prison or the central asylum for criminal lunatics to a district lunatic asylum, shall be defrayed out of moneys provided by Parliament."

And then follows a plain and clear definition of who the "criminal lunatic" is who is legislated for by section 3. Section 6 says:—"In this Act the expression 'criminal lunatic' means—(*a*) any person for whose safe custody during His Majesty's or the Lord Lieutenant's pleasure His Majesty or the Lord Lieutenant or the Admiralty is authorized to give order; and (*b*) any person whom the Lord Lieutenant or a Secretary of State or the Admiralty has, in pursuance of any Act, directed to be removed to an asylum or other place for the reception of insane persons."

Read that definition into section 3, and it will run:—"All expenses incurred in relation to any person confined in a district lunatic asylum whom the Lord Lieutenant or a Secretary of State

Appeal. 1905.

RICHMOND ASYLUM BOARD *v.* THE KING.

The Lord Chancellor.

or the Admiralty has, in pursuance of any Act, directed to be removed to an asylum or other place for the reception of insane persons, shall be defrayed out of moneys provided by Parliament."

The persons in question clearly come within that definition. I see no great injustice or anomaly when soldiers are sent by the military authorities to the asylum that their maintenance should be paid out of public funds.

How is the definition clause met by the Attorney-General? He contends that because up to 1901 such persons were not either directly or by virtue of a definition "criminal lunatics" "person" in clause (*b*) should be read "prisoner," or be treated as a mistake for "prisoner"—the word used in the Act of 1884—or was a misprint. That is a mode of construing Acts of Parliament for which there is no warrant. The language of an Act of Parliament may be taken great liberties with, if its being read grammatically involved absurdity or caused the section to fail in operation; but no such reasons can apply to this section 3 coupled with section 6. All it does is to cast upon public funds a new burden by clear language. I can imagine arguments being used that it was both reasonable and proper to do this, and that the Act would have been opposed if it had been not framed as it is. But we really have nothing to do with such considerations when we have to deal with language clear in itself, and leading to no absurdity or failure in operation.

The Attorney-General also strongly relied on the proviso in section 6. But that operates when the case of the criminal lunatic in the more limited sense arises, in the events stated in the proviso, and in my opinion affords no warrant for reading "any person" and "any Act" in any other way than in their ordinary plain meaning.

I concur in the result of Mr. Justice Barton's clear judgment, and think this appeal must be dismissed with costs.

FITZGIBBON, L.J.:—

Anything that I can say will only be an elaboration of the reasons already stated by Barton, J., and I might content myself by adopting his judgment.

The plain rule of interpretation in cases of this sort is to read

the defining words given in the definition clause into each place in the Act where the defined words occur, and then to give effect to the text, unless something inconsistent or repugnant would result. No doubt there are provisions in the Lunacy Act, 1901—the Attorney-General relied strongly on one in the proviso in sect. 6—which are applicable only to the real, as distinguished from the notional or defined "criminal lunatic." However, there is nothing that amounts to repugnancy or inconsistency in giving the defined meaning to the words "criminal lunatic" in sect. 3, and accordingly the definition must there prevail.

The Land Acts are full of instances like the present, where a defined word is by the definition made to bear a meaning quite unlike its ordinary meaning, and where every provision in the Act cannot be made applicable to the thing which must be held to form part of the subject-matter of some sections at least, by reason of its being "deemed to be" something that it is not. The Workmen's Compensation Acts afford other examples of the same mode of legislation. A glance at the definition clause will show what heterogeneous things are there deemed to be "factories."

Were Mr. Clancy in the House of Commons instead of in this Court, I can conceive many arguments which he might use to show that the word "person" ought to be used in the Irish Act where "prisoner" occurs in the corresponding English Act. Why should the Government send sailors and soldiers to an asylum where the local rates must pay for them? Is it not more just that the expenses of their maintenance should be provided by Parliament than by the local rates? Why not give to the Government direction for the removal of a lunatic, the force of an undertaking to pay for him during his detention?

As to the contention that "person" is a misprint for "prisoner," we cannot indulge in the suspicion of a misprint merely because words are like each other. To one who knows the various departments to whom a Bill is submitted in proof, such a contingency seems very improbable; some Irish department may have made the change, or left it in the proof; but where no repugnancy arises from the words as printed, no Court can assume that there is a misprint.

Appeal. 1905.

RICHMOND ASYLUM BOARD *v.* THE KING.

HOLMES, L.J. :—

In adding a few words to what has already been said, I do so more by reason of the importance than the difficulty of the matter in controversy.

Under section 3 of the Lunacy (Ireland) Act, 1901, all expenses of criminal lunatics confined in a district lunatic asylum in Ireland shall in future be defrayed out of moneys provided by Parliament. Section 6 defines the meaning of the words "criminal lunatic" as being—"(*a*) Any person for whose safe custody during His Majesty's or the Lord Lieutenant's pleasure His Majesty or the Lord Lieutenant or the Admiralty is authorized to give order; and (*b*) Any person whom the Lord Lieutenant or a Secretary of State or the Admiralty has, in pursuance of any Act, directed to be removed to an asylum or other place for the reception of insane persons."

There is, I think, no doubt that the model of this section is to be found in the Criminal Lunatics Act, 1884, section 16, and that this last-mentioned provision was before the eyes or, at least, in the mind, of the draftsman of the Irish clause; but, besides the necessary introduction of the Lord Lieutenant, he altered the first two words of sub-section (*b*) in the Act of 1884 from "any prisoner" into "any person." The effect of this change is apparently to bring within the scope of the Act lunatic soldiers who, not being prisoners, are sent to an asylum by order of a Secretary of State, given under the provisions of the Army Act, 1881, section 91; and the natural inference from the alteration is that the Legislature intended to include in the description of criminal lunatics in Ireland persons not so included in England. This is the contention of the petitioners, and the real answer of the Attorney-General is, that "person" having been substituted for "prisoner" by a clerical error of the draftsman, the Court ought to correct this error in its construction of the section. But, in the first place, there is nothing in the sub-section itself from which a clerical error can be inferred. If the draftsman had been instructed to provide that the expenses of the soldier lunatics whom I have mentioned should be defrayed out of moneys provided by Parliament, the change introduced into the interpretation section would have been the neatest and shortest way of carrying out such instructions. More-

over, even if I were satisfied that the alteration arose in the first instance from mistake or oversight, I must remember that both branches of the Legislature accepted it in its present shape; and I am obliged to give it precisely the same construction as if I found in Hansard that the change originated in an amendment carried after debate and division. The general intention of a statute may be called in aid when construing words that are absurd and unintelligible in themselves, or that are inconsistent with other parts of the same enactment: but in this case there is neither absurdity nor repugnancy. It is as reasonable to provide out of Imperial Funds for the expenses of lunatic soldiers sent to an asylum as lunatic prisoners. I assume that previous to 1901 the words "criminal lunatic" were always used as legislation to describe lunatics in custody, who had either been charged with or convicted of crime; and I should so construe them in this Act were it not for the interpretation section. It is said that there is something incongruous in including among criminal lunatics innocent men; but a large proportion of persons, who are undoubtedly called in legislation criminal lunatics, have never been convicted of any crime, and are, therefore, in the eyes of the law innocent. Besides, we cannot limit what may be effected by skilful definition in a statute. Instances might be multiplied indefinitely of the same word being used to include things fundamentally different and unlike, such as—to give one example—"superior interest" in the Land Law (Ireland) Act, 1896, sect. 31, sub-sect. 8.

The only other argument used by the Attorney-General is, that some of the provisions of the Act of 1901, including the proviso that follows the definition, are only applicable to cases where the lunatic is a prisoner. No doubt this is so; but, as many of the criminal lunatics, as now defined, will be prisoners, there is ample subject-matter for the application of these provisions. I can find no ground for allowing the appeal.

Solicitors for the suppliants: *V. B. Dillon & Co.*
Solicitor for the Crown: *Sir P. Coll.*

Barton, J.
1907.

Nov. 25.
Dec. 13.

BEAMISH *v.* WHITNEY.

(1907. No. 1005.)

Mortgage—Statute of Limitations—Part payment—Disputed question of fact—Originating summons—Order LV., Rule 7—Practice.

Certain lands were subject to a mortgage. Since 1884 no money was paid by the mortgagor in respect of the interest thereon, but the mortgagee, who was a sister of the mortgagor, alleged that bags of potatoes were sent every year by the mortgagor to her as mortgagee in lieu of payment of interest. The mortgagor alleged that they were sent merely as presents. The mortgagor died in 1905, and his executrix, in the schedule of assets, set out the mortgage as a subsisting incumbrance.

A summons was taken out, under Order LV., Rule 7, by the personal representatives of the mortgagee, for an order declaring the mortgage well charged, and for a sale; and several conflicting affidavits were filed:—

Held (1), that the present proceeding, being in the nature of an action for foreclosure, was not a proceeding to recover a sum of money charged on land, but to recover the land itself, and that, consequently, the title of the mortgagee after the expiration of the statutory period could not be revived by a subsequent acknowledgment; and (2) that the question whether the potatoes were sent in lieu of interest upon the mortgage debt, or as presents, involved a disputed question of fact, or of inference from facts, which was not to be decided upon a summons of this kind.

ADJOURNED SUMMONS.

By an indenture of mortgage dated 2nd November, 1865, Henry Hungerford Whitney granted part of the town and lands of Nohoval, Kinsale, county Cork, to Margaret Heard, to secure the repayment of a sum of £500 with interest at 5 per cent.

By an indenture, dated 28th June, 1875, Margaret Heard assigned her interest in the mortgage to William Whitney, father of Henry Hungerford Whitney.

By his will, dated 31 July, 1877, William Whitney bequeathed all his property to his daughter, Anna Daunt Whitney, whom he appointed his executrix. He died on 20th August, 1889.

Henry Hungerford Whitney predeceased his sister, Anna

Daunt Whitney, in the year 1905, and probate of his will was granted to his widow, Jane Whitney (the defendant) on the 28th July, 1906, to whom he devised the said lands of Nohoval. In the schedule of assets prepared for the purposes of probate Mrs. Whitney set out the mortgage debt of £500, under Schedule B, as a subsisting incumbrance for the purpose of duty deductions.

Miss Anna Daunt Whitney died on 28th November, 1906, and by her will she bequeathed the said mortgage for £500 to Dr. Thomas Beamish (one of the plaintiffs).

There was no payment of money in respect of interest on the mortgage since 1884; but the plaintiffs alleged that in lieu of money certain bags of potatoes had been annually sent by the mortgagor to the mortgagee, and several affidavits were filed in support of this allegation. On the other hand, affidavits were filed by the defendant, alleging that the potatoes were sent as mere presents or courtesies between brother and sister.

This summons was taken out by the executors of the will of Miss Anna Daunt Whitney claiming to have the mortgage declared well charged on the lands comprised in it and for sale.

Jefferson, K.C., and *Hon. Cecil Atkinson*, for the plaintiffs:—

The consignments of potatoes were clearly made in lieu of payment of interest, and the mortgage debt is therefore not barred. The inclusion of the mortgage debt in the schedule of assets of the mortgagor amounts to an acknowledgment within the meaning of section 8 of the Act of 1874, and the debt due on the covenant is undoubtedly revived: *Harty* v. *Davis* (1); *In re Clifden* (2). If the question whether the title to the lands involves such a disputed question of fact that it cannot be suitably decided in a form of proceeding like the present, the summons should be amended into one for administration.

A. M. Sullivan, for the defendants:—

The question whether the title to the lands has been kept alive by the sending of the potatoes, which we allege was nothing more than presents from one relative to another, involves a disputed

(1) 13 Ir. L. R. 23. (2) [1900] 1 Ch. 774.

Barton, J. 1907.

BEAMISH v. WHITNEY.

question of fact, which cannot be decided in a proceeding of this nature: *In re Powers* (1). Once the title to land is barred an acknowledgment after the expiration of the statutory period cannot revive it: *Sanders* v. *Sanders* (2); *Kebble* v. *Fairthorne* (3). Consequently, the inclusion of the mortgage debt in the schedule of assets cannot be relied on as an acknowledgment where, as here, the proceeding is against the land.

Dec. 13.

BARTON, J.:—

This was a mortgagee's summons under Order LV., Rule 7, which enables a mortgagee to take out an originating summons in the Chancery Division seeking sale or delivery of possession of the mortgaged premises. The purpose of the summons is to enforce the mortgagee's remedy against the land by sale in default of payment. The form of the summons follows that of a decree for foreclosure in default of payment, to be found in Seton on Decrees, vol. iii., at p. 1895. In the corresponding English rule (Order LV., Rule 5A) the word "foreclosure" occurs. It is omitted in the Irish rule, because sale rather than foreclosure is in Ireland the usual remedy of a mortgagee against the land; but a summons of this kind, which aims at the sale of the land, is in the nature of a suit for foreclosure, and, as a general rule, is governed by the principles applicable to actions for foreclosure.

It appears that there has been no payment of money in respect of the interest upon this mortgage since 1884; and the defendant submits that plaintiff's title was extinguished from and after 1896 by the operation of the Statute of Limitations. Plaintiff, on the other hand, alleges that since 1884 some potatoes were sent every year by the mortgagor to the mortgagee in lieu of payment of interest. Defendant disputes this allegation, and asserts that any potatoes that were sent to the mortgagee were sent as gifts or courtesies between near relatives, and not in respect of interest on this mortgage. The defendant is entitled to have this disputed question of fact, or of inference from facts, tried by oral evidence, subject to cross-examination, and not by affidavits upon a summons of this kind. I am of opinion that, for reasons similar

(1) 30 Ch. D. 291. (2) 19 Ch. D. 373. (3) [1895] 1 Ch. 219.

to those mentioned by Lindley, L.J., in *In re Giles* (1), I cannot dispose of this question of fact upon a mere originating summons. The Court can, upon a summons, dispose of questions of law, however difficult, but not of disputed questions of fact.

But plaintiff produces a schedule of assets which defendant, as executrix of the mortgagor's will, verified on oath on 19th June, 1906, in which, under Schedule B, she returned this mortgage as a subsisting incumbrance for the purpose of duty deductions; and plaintiff says that, as a matter of law, even if the Statutes of Limitations had barred his remedy in 1896, this acknowledgment in 1906 revived his rights. That involves a question of law which is capable of being determined upon a summons. If this had been an action upon the covenant in the mortgage to recover the mortgage moneys, plaintiff would have been entitled to rely upon *In re Clifden* (2). In that case Byrne, J., was dealing with an action on the covenant in a mortgage. An action of that kind is governed by sect. 8 of the Act of 1874, which replaced sect. 40 of the Act of 1833. Byrne, J., held that the words "in the meantime" in those sections referred to a period intermediate between the time when the right of action accrued and the commencement of the action, and that an acknowledgment under those sections had the effect of reviving the debt due under the covenant, although it had been given after the remedy had been barred. He followed the Irish case of *Harty* v. *Davis* (3), which was a proceeding for revivor of a judgment. The present plaintiff would be entitled, in an action on the covenant, to contend that this entry in the schedule of assets was an acknowledgment within the meaning of section 8 of the Act of 1874, and that it revived the remedy on the covenant even if that remedy had been barred. But I need not discuss the questions to which I have just referred, because they do not, in my opinion, arise in this case. As this is in the nature of an action for foreclosure, the authorities upon section 40 of the Act of 1833 and section 8 of the Act of 1874, such as *Harty* v. *Davis* (3) and *In re Clifden* (2), do not apply. An action for foreclosure is not an action to recover a sum of money charged on lands, but is an action to recover the

(1) 43 Ch. D. 391, at p. 400. (2) [1900] 1 Ch. 774. (3) 13 Ir. L. R. 23.

Barton, J. 1907.

BEAMISH v. WHITNEY.

land itself: *Harlock* v. *Ashberry* (1). It is governed, so far as the Statutes of Limitations are concerned, by section 1 of the Act of 1874, which replaced section 2 of the Act of 1833, and also by sections 14 and 34 of the Act of 1833. An acknowledgment under section 14 of the Act of 1833 does not revive the title of the mortgagee, if it is given after the expiry of the statutory twelve years: *In re Alison* (2); *Sanders* v. *Sanders* (3). That is because section 34 of the Act of 1833 has the effect of extinguishing the mortgagee's whole title to the land, and not merely his remedy against the land. Reference may also be usefully made to Romer, J.'s, judgment in *Kebble* v. *Fairthorne* (4). For these reasons I hold that, if plaintiff's title to these lands was extinguished in 1896, the entry in the schedule of assets (even assuming it to be a good acknowledgment within section 14 of the Act of 1833, which I need not decide) did not revive the extinguished title.

The result is that plaintiff is driven back to the potatoes. He cannot succeed against the land, unless he can show that the potatoes were sent and received in lieu of payment of interest—a question of fact not to be decided upon these affidavits. He can bring any proceeding in which that question could be determined. If he sues on his covenant, he can rely upon *In re Clifden* (5). But for the reasons which I have given I am of opinion that this summons must be dismissed.

Solicitors for the plaintiffs: *Wynne & Wynne.*
Solicitor for the defendant: *Foott.*

J. MAC M.

(1) 19 Ch. D. 539.
(2) 11 Ch. D. 284.
(3) 19 Ch. D. 373.
(4) [1895] 1 Ch. 219.
(5) [1900] 1 Ch. 774.

HENNESSY *v.* KEATING.

M. R.
1907.
Jan. 24, 25, 30.
Feb. 1, 6.
May 18.

Appeal.
Nov. 19–21, 25.
Dec. 10.

Injunction—Trade mark—Label—Registration—Infringement—Similarity—Evidence—Likelihood of deception—Advertisements and circulars—Inspection by Judge.

The plaintiffs were owners of a registered trade mark, which had the form of a square body-label, printed in gold on a white ground, and which was affixed to every bottle of Cognac brandy exported by them to the United Kingdom, with which they carried on a large and long-established trade. This body-label consisted of a frame of vine-leaves and grapes in the form of a garland, rising out of a double stem, and tied at the base with a ribbon. The frame surrounded a space, in the centre of which was placed the name of plaintiffs' firm and its place of business ("H. & Co., Cognac"), and was surmounted at the top of the central space by a device of a mailed arm and hand grasping a battle-axe rising out of a scroll or heraldic bar. There was also a neck-label, with a star device, attached to the bottles exported by plaintiffs, but this was no part of the registered mark.

Plaintiffs brought an action for infringement of trade mark, and to restrain the defendant in respect of the sale of bottles of brandy which were labelled with a label of the same shape as the plaintiffs' registered label, and which were also printed in gold on a white ground, and consisted of a frame of vine-leaves and grapes, enclosing a central space in which appeared the words "Celebrated Old Brandy"; and above, in place of the "arm and battle-axe" device, there was a prolongation of the grape and vine-leaf garland. There was no name of any manufacturer or shipper on the label or bottle, nor was there any neck-label or star device thereon.

It appeared that in cautionary advertisements and notices the public were warned not to accept brandy as Hennessy & Co.'s without their name and the device of the battle-axe on the label.

Evidence was given that a garland of vine-leaves and grapes printed in gold on a white ground was commonly used by bottlers of brandy.

Plaintiffs called no witnesses, either to prove actual deception or that the label of defendant was calculated to deceive.

According to the testimony of a number of witnesses examined for the defendant, the impeached label was not calculated to deceive and could not mislead anyone, as, in their opinion, the essential characteristics of the registered mark were absent from the impeached label. It further appeared from evidence, which the Court of Appeal considered reliable, that the impeached label had been produced more than twenty-six years ago by a firm of printers which was

M. R. 1907.

HENNESSY v. KEATING.

dissolved in 1898, and had been for that period in constant and well-known use by the trade in Dublin; and that the labels (eleven in number) actually used by the defendant were found by his assistant in a drawer when he took possession in 1897, apparently left by his predecessor:—

Held, by the Master of the Rolls, (1) that the label of defendant was an infringement of plaintiffs' trade mark, and that, taking the labels as a whole, the label of the defendant so nearly resembled that of the plaintiffs as to be liable to deceive an incautious purchaser.

(2) That the calling of evidence to prove actual deception, or that the label was calculated to deceive, in a case of this kind, was unnecessary, as the Court must ultimately decide the question of similarity itself.

(3) That, as a fact, the impeached label was used, and the arrangement of the bottles in the defendant's shop was made, with the purpose of deceiving an unwary purchaser.

Held, by the Court of Appeal, that there was no evidence of intention to deceive purchasers; that on inspection the labels were dissimilar in their essential characteristics, especially in those specified by the plaintiffs in their cautionary advertisements and notices; and that, accordingly, the plaintiffs were not entitled to an injunction.

TRIAL OF ACTION.

This was an action brought by the plaintiffs, who were manufacturers and exporters of brandy, of Cognac, in France, against the defendant, who carried on business as a family grocer, and tea, wine, and spirit merchant, at 70, Store Street, Dublin.

The plaintiffs' principal business was, and had been for several years past, to sell brandy manufactured and exported by them to the trade in bottle; and a very large quantity of bottled brandy was annually exported by them to Great Britain and Ireland, and sold to persons carrying on the trade of wine and spirit merchants. Their brandy was of a very superior quality, and had acquired a great reputation in the British and Irish markets, where it commanded a very high price. Every bottle of brandy exported by the plaintiffs bore a body-label, square in shape, printed in gold on a white ground, in the centre of which appeared the name of the plaintiffs' firm, "Jas. Hennessy & Co., Cognac," encircled by a border (also printed in gold) of vine-leaves and grapes in the form of a garland, tied at the base with ribbon, and there was at the top of the central space a mailed arm and hand, grasping a battle-axe, issuing out of an armorial scroll or heraldic bar. There had been also for some time back a small

crescent-shaped label attached to the neck of each bottle of plaintiffs' brandy, with a star device thereon, the number of stars denoting the maturity or age of the brandy; but the plaintiffs did not claim any exclusive right in the star device. The body-label was registered by the plaintiffs in January, 1876, as a trade mark, under the Trade Marks Registration Act, 1875, and was duly re-registered under the Patents, Designs, and Trade Marks Acts, 1883–1888. Three certificates were proved, each dated 27th July, 1906, of registration as a trade mark of the body-label, accompanied by a star device in the case of two of the trade marks—(*a*) a two-star mark, and (*b*) a three-star mark. In the case of the three-star mark the certificate of registration contained the following words:—"The applicants disclaim any right to the exclusive use of the star devices, the said devices being commonly used in the trade concerned in the goods to which the mark is applied."

The user claimed for the trade mark with three stars was stated in the certificate of registration as having commenced about twenty-seven years before the 23rd December, 1892. The user claimed for the body-label with the two stars was for about ten years before the 24th January, 1876. The user claimed for the body-label without any star was about twenty years before the 24th January, 1876. The body-label had been used by plaintiffs for half a century on bottles exported to the United Kingdom. The plaintiffs had from time to time issued to their customers and others circulars, giving notice that the exclusive use of the body-label was secured to them by law, and from time to time inserted in the daily and other papers notices cautioning traders against infringing their trade mark label, and claiming the exclusive right thereto.

By their advertisements in the *Times* and other papers, and other notices, the plaintiffs called the attention of the trade and the public to the distinguishing features and essential characteristics of their trade mark labels, warning the public that if they wanted Hennessy's brandy they should look for the name "Jas. Hennessy & Co." on the bottle, and for the sign of the stars—the stars being used to designate the maturity of the brandy—one star denoting six years old, two stars nine, and three stars twelve

M. R. 1907.

HENNESSY v. KEATING.

years old brandy. Their notices stated that every genuine bottle of Hennessy's brandy had affixed to it a label bearing the name "Jas. Hennessy & Co., Cognac," printed in gold letters on a white ground, and encircled by a wreath of vine-leaves and grapes, in the upper part of which was shown their registered trade mark of an arm and hand grasping a battle-axe.

The defendant offered for sale and sold brandy (not manufactured or exported by plaintiffs) in bottles, to which was affixed a body-label of the same shape as that of the plaintiffs, and it was also printed in gold on a white ground. The words "Celebrated Old Brandy" were in the centre of the defendant's label, and the label was surrounded by a garland of vine-leaves and grapes, tied at its base with a ribbon, and resembling the border or garland on the label of the plaintiffs. There was no mailed arm and hand grasping a battle-axe on the defendant's label, but, instead of this, there were grapes and leaves grouped round a sort of scroll or heraldic bar, resembling that on the label of plaintiffs. The words "Hennessy & Co." or "Cognac" were not on defendant's label. There was no name of any manufacturer or shipper. There was no star device on the label or attached to the bottle offered for sale by the defendant. Facsimiles of the respective body-labels are given on the leaf facing this page.

The star device was of common use in the trade. Evidence was given that a garland of vine-leaves and grapes, printed in gold on a white ground, was in common use on brandy bottles.

The plaintiffs claimed an injunction to restrain the defendant from infringing the plaintiffs' registered trade marks, and an injunction to restrain him from selling, or offering or advertising for sale, any brandy not being brandy manufactured by the plaintiffs in bottles bearing such labels, or so got up as to be calculated to lead the public or purchasers to believe that the brandy bottled for or sold by the defendant was in fact manufactured by the plaintiffs, and from using, in connexion with the sale of brandy, labels which were colourable imitations of the plaintiffs' trade mark labels, or which were so contrived or expressed as to be calculated to lead the public or purchasers to the belief that the brandy sold thereunder was manufactured or supplied by the plaintiffs.

The defendant denied that the labels used by him were a colourable imitation of the registered trade mark label of the plaintiffs, and contended that they were not an infringement thereof, and he denied that the labels used by him were of the same shape, colour, or appearance as the label of the plaintiffs, or that they were calculated to mislead purchasers or others into the belief that the brandy sold by him was brandy sold, or manufactured, or bottled by the plaintiffs.

No evidence was given by the plaintiffs proving that any member of the public had been actually deceived in the purchase of brandy, and no expert was examined to show that a purchaser would be likely to be deceived by reason of the similarity of the labels.

On behalf of the defendant a number of witnesses were examined for the purpose of showing that the label was not calculated to mislead or deceive even an incautious or unwary purchaser; that no person could be deceived, as the name "Hennessy" was not on the label, no matter what points of resemblance there might be between it and the registered label of plaintiffs; and that the absence of the name "Hennessy" and the mailed arm and hand and battle-axe from the "Celebrated Old Brandy" label made it impossible for customers to be deceived.

Evidence was also given that purchasers of brandy were generally an intelligent class, and generally asked for Hennessy's brandy by name, and looked at the label for the name.

The defendant gave evidence, in which he stated that he was in the habit of selling Hennessy's brandy, and always sold it in Hennessy's bottles with their labels attached thereto, and that whenever asked for their brandy he supplied it to the customer, and never attempted to pass off another brandy for Hennessy's. He had a large, framed show-placard prominently placed in his shop, showing the label of the plaintiffs, with the name "Jas. Hennessy & Co." and the mailed arm and hand grasping the battle-axe. There were a number of bottles of Hennessy's brandy, with their labels attached, on the shelf, where the bottles of "Celebrated Old Brandy" were placed. His assistant deposed that the impeached labels (eleven in number) were found in a drawer when the defendant went into possession of the Store Street

M. R. 1907.

HENNESSY v. KEATING.

premises in 1897. Evidence was also given to show that the label in question had been printed and was used by the trade for cheap brandy for upwards of twenty-six years. A summary of the testimony of the witnesses which the Court of Appeal considered material will be found in the judgment of Lord Justice Fitz-Gibbon, *infra*.

The Right Hon. J. H. Campbell, K.C. (with him *Gordon, K.C.*, *Blood, K.C.*, and *Figgis*), for the plaintiffs:—

The question in this case is one of fact, which the Court will have to determine on the view, as to whether the labels placed on the bottles of the defendant constitute a colourable imitation of the registered label of the plaintiffs. On comparison of the two labels there will be no difficulty in coming to the conclusion that the label of the defendant is in almost every respect an imitation of the plaintiffs' label. On the defendant's label all reference to the shipper's name is eliminated, and the words "Celebrated Old Brandy" have been substituted for "Jas. Hennessy & Co., Cognac"; but in other respects the labels are practically identical in size, shape, and colour.

The "vine-branch" is almost a copy. The actual number of leaves and the same number of bunches of grapes are reproduced, and there is the peculiarity of the double stem of the vine and of the two stems growing side by side. The ribbon at the foot is identical in each (like a true lover's knot), and the loops of the knot all point upwards in the same direction. The battle-axe in plaintiffs' label stands on an heraldic bar, and the bar (though not the battle-axe) appears on the defendant's label. It is clear that the "Celebrated Old Brandy" label was designed and fashioned in imitation of the label of the plaintiffs. The fact that it contains no information as to the shipper or manufacturer makes the impeached label more deceptive, as, if it had a name on it, the public would have noticed that the bottle did not contain the brandy of plaintiffs; but the effect of the omission of any name is that the contents of the bottle might, consistently with the label, be Hennessy's brandy.

It is a question of fact whether the registered design has been infringed, whether this impeached label is calculated to deceive

purchasers. The question is one for the Judge to decide upon inspection and on comparison of the two labels; and the evidence of experts as to likelihood of deception is irrelevant. Such evidence usurps the function of the Court. See the observations of Lord Macnaghten in *Payton* v. *Snelling* (1). *De Kuyper* v. *Baird* (2) is on all fours with the present case. That was an action to restrain a firm of printers and publishers in Belfast from printing a label which was, taken as a whole, a colourable imitation of a registered label. Sir A. M. Porter, M.R., held, as the result of his own inspection, that there was an infringement. The labels had in common a collocation of certain things; the general design and the picture presented to the eye were the same. He held that the impeached label was framed and calculated and designed as a colourable imitation of the other. Sir A. Porter says: "It is absolutely impossible to believe for a single moment that these two labels are the result of independent effort by two artists working on independent instructions, and without conscious imitation, and the plaintiffs' label has been in use for half a century or so," &c. Apply that to this case. The designer of the "Celebrated Old Brandy" label was copying the Hennessy label, omitting the battle-axe, of course, and the name of the firm, but in every other way he has made a copy: and where he has omitted Hennessy's name he has inserted, not the name of the alleged producer of this brandy, but a collocation of words which give no indication of the name of the producer, and which are placed in such type and colour as to deceive anyone not making a close scrutiny into the similarity.

The present is a stronger case than *De Kuyper* v. *Baird* (2). No trader can adopt a trade mark so resembling that of a rival as to be likely to mislead ordinary purchasers, purchasing with ordinary caution. *In re Worthington's Trade Mark* (3) is a very strong case. A trader taking any material and substantial part of a trade mark belonging to another must take such precautions as to avoid the reasonable probability of deception. The onus is on him to show that purchasers will not be deceived: *Orr-Ewing & Co.* v. *Johnson* (4). This case went to the House of Lords (5), and the

(1) [1901] A. C. 308. (2) 20 R. P. C. 581. (3) 14 Ch. D. 8.
(4) 13 Ch. D. 434. (5) 7 A. C. 219.

M. R. 1907.

HENNESSY v. KEATING.

principle there laid down is that "no trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade mark may be restrained by injunction, although no purchaser has actually been misled." The impeached trade mark must not be likely to mislead an intending purchaser. So far as the vine-leaf border is concerned there has been practically a reproduction of Hennessy's label; and in the last-mentioned case what Lord Watson says is applicable to this case. He says (p. 232), "It was eminently the duty of the appellants in adopting a ticket of their own to avoid every feature of the older trade mark." Here, as regards the vine-leaf, the resemblance is complete.

The whole design is to be looked at. The Court must look at the entire, and if the two labels are practically similar, even though different in some essentials, an injunction must go: *In re Christiansen's Trade Mark* (1).

Taking all the matters referred to together, and placed as they are with regard to each other, are they likely to deceive? That is the question. The worst feature about the label in the present case is the suggestive absence of the name of the producer or the vendor of this particular brandy. The particular appropriation of this vine-leaf border or pattern that the defendant has used is a transparently plain reproduction of that portion of their registered trade mark which consists of this border. The bottom part is absolutely identical in both. If it is suggested that any part of this registered label has appropriated anything that is common to the trade, the remedy is not to imitate it, but to apply to have it taken off the register.

What was the designer at who designed this label? The absence of any reference to the designer or producer or the publican is the strongest evidence to show that the original design was to make it run as close to the genuine one as possible; the design was to reproduce a label that might be mistaken for that of Hennessy & Company.

It is not necessary that the resemblance should be such as would deceive persons who saw the two labels placed together:

(1) 3 R. P. C. 54.

Seixo v. *Provezende* (1). In an action like the present evidence of actual deceit is not necessary, for the Court acts on the principle of protecting property: *Bourne* v. *Swan & Edgar* (2). *London General Omnibus Company* v. *Lavell* (3) was a Common Law action for deceit.

The onus lies on defendant to show that there is no chance of deception; and the object of an honest trader, anxious to commend his own goods, ought to be to brand them with a mark as unlike as possible to other brands, instead of trying to get as close as he can in the way of imitating them: *Seixo* v. *Provezende* (1); *De Kuyper* v. *Baird* (4); *Singer Manufacturing Co.* v. *Wilson* (5).

Ronan, K.C., and *James O'Connor* (with them *Moriarty, K.C.*), for the defendant:—

The plaintiffs have produced no witness to prove that any person has been deceived.

No person looking at defendant's label could be deceived, or think that the brandy contained in the bottle with such label affixed to it was Hennessy's, especially as the class of persons who are in the habit of drinking brandy are as a rule superior to, and possessed of greater intelligence than, drinkers of whiskey. Nor was any person produced to state, even as a matter of opinion, that the "Celebrated Old Brandy" label was likely to mislead anybody. In *De Kuyper* v. *Baird* (4) a number of witnesses were produced, who stated that the impeached label would be likely to deceive purchasers. In this case no ordinary purchaser purchasing with ordinary caution could be misled.

The defendant's label is not calculated to deceive; *Seixo* v. *Provezende* (1); Sebastian, Law of Trade Marks, p. 129.

In the label of the defendant the name "Hennessy" does not appear, nor does the battle-axe; and, having regard to all the cautionary notices about the necessity of seeing the name and the battle-axe, no one would think of trying to pass off another brandy as being Hennessy's, especially where, as in this case,

(1) L. R. 1 Ch. 192.
(2) [1903] 1 Ch. 211.
(3) [1901] 1 Ch. 135.
(4) 20 R. P. C. 581.
(5) 3 A. C. 376.

M. R. 1907.

HENNESSY v. KEATING.

Hennessy's agent had furnished a placard calling special attention to these matters, which was placed in a prominent position in defendant's shop.

This case is not the same case as *De Kuyper* v. *Baird* (1), where the goods of a manufacturer, from the device he has used, have become known by a particular name. In that case anyone seeing the heart-shaped label on a bottle knew that it purported to be De Kuyper's gin; and in that case Couser was adopting a mark because he thought, in the words of Lord Cranworth, that he was adopting a mark which would cause his goods to bear the same name in the market—in that case the name of De Kuyper. The fair inference was that De Kuyper's gin was being sold by William Couser. Moreover, all the essential points in the labels were identical in the Couser case. There is no comparison between the two cases. No one able to read would mistake "Celebrated Old Brandy" for "Jas. Hennessy & Co., Cognac." The name of the plaintiffs is the leading characteristic which has given the name to the goods we are dealing with, as Fry, L.J., says in *Orr-Ewing* v. *Johnson* (2), "The two elephants were the material and substantial part of the plaintiff's ticket, because they communicated the name to the goods"; and see the observations of Lord Selborne in the House of Lords (3).

In this case expert evidence as to the likelihood of deception is not forthcoming. *Mitchell* v. *Henry* (4) bears on the question. The present case, like that one, is essentially a case where expert evidence should be produced: see the observations of Cotton, L.J., in *Mitchell* v. *Henry* (4). As to the absence of evidence of deception, see *London General Omnibus Company* v. *Lavell* (5); *Payton & Co., Limited* v. *Snelling* (6). The use of the garland of vine-leaves and grapes, and also the printing in gold upon a white ground, is common to the trade. In no case in which there has not been proof of actual deceit has an order been made without evidence that an impeached mark was calculated to deceive. The plaintiffs have not discharged the *onus* of proof. There is no real risk of misleading any person who wanted Hennessy's brandy

(1) 20 R. P. C. 581.
(2) 13 Ch. D. 434.
(3) 7 A. C. 219.
(4) 15 Ch. D. 181, 195.
(5) [1901] 1 Ch. 135.
(6) [1901] A. C. 308.

(though he did not ask for it), even though he had forgotten that the vital point of the label was the name Hennessy. The defendant acted with good faith. He did not attempt to pass off his goods as the goods of the plaintiffs. He sold "Celebrated Old Brandy" believing he had a right to do so. A fraudulent intention should not be presumed. A number of witnesses have proved that the label, though in some respects resembling that of plaintiffs, was so different that no one could possibly be deceived by it. The evidence is all one way. As to the necessity for such evidence on the part of the plaintiffs, see the observations of Lord Alverstone in *London General Omnibus Company* v. *Lavell* (1); *Schweppes* v. *Gibbens* (2).

In *Hennessy* v. *Dompé* (3), the present plaintiffs sought an injunction to restrain the use of a label almost exactly the same as that they now complain of, and Kekewich, J., refused the injunction. The plaintiffs appealed from that judgment; and from the report (20 Patent Cases, 175) it is plain that the respondent had been bought off, and that there was a compromise.

In *Alaska Packers' Association* v. *Crooks & Co.* (4) the two labels in question were very like each other. The plaintiffs relied both on trade mark and on passing off, and it was decided that there was no infringement, and that, putting aside the common features, and considering the distinctive particulars, there was to the eye no probability of the defendants' tin deceiving, and there was no evidence that it would deceive, any intelligent customer. That case shows that the customer must know what were the distinguishing features before he could be deceived by alleged similarity into thinking that the thing was something else. In this case the distinguishing features are the *name* and the *battle-axe*. The garland of vine-leaves and grapes and printing in gold on a white ground are common to the trade.

Schweppes, Limited, v. *Gibbens* (2) is instructive, and it shows that in order to consider the question of probability of deception the customer must see the label fairly; and that it is not to be assumed that the vendor is covering a part of it; and that it must be seen so that the salient characteristics can be distinguished.

(1) [1901] 1 Ch. 135.
(2) 22 R. P. C. 113, 601.
(3) 19 R. P. C. 333.
(4) 18 R. P. C. 129.

M. R. 1907.

HENNESSY v. KEATING.

In that case the House of Lords attached much importance to the absence of any evidence of actual deception. Lord Robertson said that no one having the two labels in his hand could be deceived; and Lord Lindley said: "The resemblances here are obvious; but, unfortunately for the plaintiffs, so are the differences. The differences are not concealed. They are quite as conspicuous as the resemblances." These observations apply with force to the present case. See also *Dawson* v. *Stewart* (1); and *Schweppes* v. *Biscomb* (2).

Blood, K.C., in reply:—

Hennessy v. *Dompé* (3) was not referred to by plaintiffs' counsel, because it was looked on as a neutral case. The decision of Kekewich, J., there was adverse to plaintiffs on a label very like the present, except that it honestly disclosed the name of a shipper. That decision was reversed on appeal according to the report, and there is nothing to show that there was any compromise. If anything, it is an authority for the plaintiffs.

To establish infringement of a registered trade mark, it is not necessary to show fraudulent intention: Sebastian on Trade Marks, p. 124; *Singer Manufacturing Co.* v. *Wilson* (4). The question is one for the Judge at the trial, whether the impeached label is calculated to deceive the class of purchaser whom the Court looks upon as entitled to protection. Here the plaintiffs have registered a label, every portion of which goes to form the entire registered trade mark; and on that ground alone the present case can be distinguished from every case on which the defendant has relied. This case closely resembles *De Kuyper* v. *Baird* (5). In that case the Court was satisfied that the plaintiffs were entitled to the exclusive use of a registered label and to every feature in it—not to every feature individually, but to the label as a whole; and they were held entitled to the protection which the statute gives to the absolute use and enjoyment of the trade mark so registered.

(1) 22 R. P. C. 250.
(2) *Ibid.* 608.
(3) 19 R. P. C. 333.
(4) 3 A. C. 376.
(5) 20 R. P. C. 581.

The authorities show that if the Court discovers in an impeached label a resemblance to a label sought to be protected, and finds that no reason can be given by a defendant for the resemblance except for the purpose of misleading, the Court will infer an intention to mislead; and this circumstance is most material on the question of infringement: Sebastian on Trade Marks, p. 136.

Both *Payton* v. *Snelling* (1) and *Schweppes' Case* (2), on which Mr. O'Connor relied, were merely passing off cases, and not cases for infringement of registered trade marks. The *London General Omnibus Co.* v. *Lavell* (3) was an action for deceit only; and the objection to the Judge's inspection of the vehicles in the yard was that he decided that the defendants were guilty of deceit, without hearing any evidence at all; and on this ground his decision was reversed. *Alaska Packers' Association* v. *Crooks* (4) is also distinguishable. That class of case, where the article sold and the mode of sale differ so greatly from the article sold by the defendant here, cannot assist the Court in coming to a conclusion in this case.

The plaintiffs have three things to prove—(1) the existence of their trade mark; (2) the exclusive right to the use of it; and (3) the fact that it has been imitated colourably without their leave; and proof of these three matters constitutes infringement. This label is, as a whole, under the statute, the exclusive and absolute property of plaintiffs. Registration gives exclusive ownership of the label. There may be some elements in Hennessy's label for which, standing alone, if application were being made now for registration, plaintiffs might be met with the objection that they were common to the trade; or they might possibly be put under terms to disclaim the exclusive use of these devices. But registration was granted in 1876, with twenty years' user before that, and re-registration in 1890 and in 1904 without objection; and accordingly the plaintiffs have secured the absolute ownership of a label in which the ground-work is white, the printing is gold; and a square band and a border of vine-leaves and grapes surround the

(1) 17 R. P. C. 48, 628; [1901] A. C. 308.
(2) 22 R. P. C. 601.
(3) [1901] 1 Ch. 135.
(4) 18 R. P. C. 129.

M. R. 1907.

HENNESSY v. KEATING.

label. No doubt it bears the name "Hennessy" and the "battle-axe"; but there are at least five distinct elements in the plaintiffs' registered label which are reproduced in the defendant's. All these features of similarity are taken for the purpose of manufacturing a label for the sale of an article which is not the production of plaintiffs, when a label could easily be devised which would not be subject to any objection.

In *De Kuyper* v. *Baird* (1) the plaintiffs failed to show any monopoly in the "heart shape," and the Master of the Rolls held that the plaintiffs had not established that their gin was known as "Heart Label" gin. He found, however, that there was a fraudulent and colourable imitation of De Kuyper's trade mark. De Kuyper's name was not in the defendant's label, nor the anchor; but the shape was the same, and the beaded border was in both. The present is a stronger case than *De Kuyper* v. *Baird* (1). This is not an honest label, and its only possible object and purpose is to mislead. Having regard to all the features of the genuine label which the defendant's label reproduces, the Court should infer that the resemblance was adopted for the purpose of misleading. The defendant has not discharged the onus cast on him of avoiding every feature of the older mark which could by any possibility create the risk of his brandy being sold as that of the plaintiffs. It is not the cautious, but the unwary and incautious, purchaser that the law protects in these cases: see the observations of Lord Blackburn in *Johnson* v. *Orr-Ewing* (2). *Seixo* v. *Provezende* (3) was a case in which a question arose as to the sale of port wine, and as to similarity of two brands or labels on casks; and Lord Cranworth held that, in order to justify an injunction, the resemblance between the two labels need not be so close as to deceive persons who saw the two marks placed side by side.

Mitchell v. *Henry* (4) was a case in which the Court required the evidence of experts. There the question was essentially one requiring such evidence. On this matter, see the observations of Lord Halsbury in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (5), which approve the

(1) 20 R. P. C. 581.
(2) 3 A. C. 376.
(3) L. R. 1 Ch. 192.
(4) 15 Ch. D. 181, 195.
(5) [1899] A. C. 83.

observations of Lord Macnaghten which have been attacked by counsel for defendant.

As to the neck label, it is a common feature in the selling of liquor. So far as it and the stars and corks are concerned, the plaintiffs have no trade-mark rights of a statutory nature. The neck label is immaterial.

May 18.

THE MASTER OF THE ROLLS:—

This action is brought by the old-established firm of Hennessy & Company, the well-known manufacturers of brandy, against the defendant, Matthew Keating, who carries on business as a family grocer, and tea, wine, and spirit merchant, at 70, Store Street, in the city of Dublin. The plaintiffs allege in their statement of claim that their principal business is and has been for several years past to sell brandy manufactured by them to the trade in bottle, and that a very large quantity of bottled brandy is annually exported by the plaintiffs to Great Britain and Ireland, and sold to persons carrying on the trade of wine and spirit merchants in these countries. They allege that the brandy so manufactured and bottled by the plaintiffs is of a peculiar description, and of a very superior quality, and has acquired a great reputation, especially in the British and Irish markets, where it commands a very high price.

I may say at once that the evidence in this case has satisfied me beyond all doubt that, so far as the city of Dublin is concerned at all events, the plaintiffs' brandy has acquired a great reputation, commands a high price, and is regarded as of a very superior quality indeed.

The statement of claim alleges that every bottle of brandy exported by the plaintiffs bears a body-label, square in shape, printed in gold on a white ground, in the centre of which appears the name of the plaintiffs' firm, "Jas. Hennessy & Co., Cognac," surrounded by a border (also printed in gold) of vine-leaves and grapes in the form of a garland, tied at the base with ribbon, and surmounted by a mailed arm and hand grasping a battle-axe.

That description, which I have read from the statement of claim, is accurate and correct in every particular; and it has been established in evidence that this body-label has been used by the

M. R. 1907.

HENNESSY v. KEATING.

plaintiffs for half a century on bottles of brandy exported to the United Kingdom.

The body-label was registered by the plaintiffs in January, 1876, as a trade mark, under the Trade Marks Registration Act, 1875, and has been duly re-registered under the Patents, Designs, and Trade Marks Acts, 1883 to 1888, and certificates have been given in evidence, three in number, each dated the 27th July, 1906, and each being a certificate of the registration as a trade mark of the body-label, accompanied by a star device in the case of two of the trade marks—(*a*) a two-star mark, and (*b*) a three-star mark; but in the case of the three-star mark the certificate of registration contains a disclaimer in these words:—"The applicants disclaim any right to the exclusive use of the star devices, the said devices being commonly used in the trade concerned in the goods to which the mark is applied."

The user claimed for the trade mark with three stars is stated in the certificate of registration as having commenced about twenty-seven years before the 23rd December, 1892. In the case of the body-label accompanied by the two stars the user claimed is about ten years before the 24th January, 1876, and the user claimed for the body-label without any star is about twenty years before the 24th January, 1876.

The plaintiffs state, as the fact is, that they have circulated in the daily and other newspapers cautionary notices, warning traders against infringing their trade-mark label, and claiming the exclusive right thereto; and they allege that they have recently ascertained, shortly before the institution of the action, that the defendant is selling and offering for sale brandy contained in bottles bearing body-labels which are, as the plaintiffs charge, colourable imitations of the plaintiffs' said registered trade-mark label, and amount to an infringment thereof. They allege that the body-label so used by the defendant is of the same shape as the plaintiffs' label, and (like the latter) is printed in gold on a white ground. Instead of the words "Jas. Hennessy & Co., Cognac," the words "Celebrated Old Brandy" appear, and the said label is surrounded by a garland of vine-leaves and grapes, tied at its base with a ribbon, in close imitation of the border or garland on the plaintiffs' said registered label; but the mailed

arm and hand grasping a battle-axe are not reproduced in the defendant's label.

That statement, as regards the label alleged to be used by the defendant, is accurate; and the fact that it has been used by the defendant on bottles which do not contain the plaintiffs' brandy is admitted. The plaintiffs also allege that the brandy offered for sale by the defendant in bottles bearing the label described in the statement of claim is inferior to any brandy bottled and exported to this country by the plaintiffs; and so I hold, as a juror, upon the evidence.

The plaintiffs allege that the label used by the defendant is a colourable imitation of their trade mark, and amounts to an infringement of it, and is calculated to mislead purchasers and others into the belief that the brandy so offered for sale by the defendant is manufactured, or exported, or bottled, by the plaintiffs' firm.

The plaintiffs allege that the defendant asserts his right to use the label complained of, and will (as the plaintiffs apprehend) continue to use the same, unless enjoined by the order of this Court. The defendant in his defence puts the plaintiffs upon proof of a number of matters. He denies that he has sold, or offered for sale, or is selling, or offering for sale, brandies contained in bottles bearing body-labels which are colourable imitations of the plaintiffs' alleged registered trade-mark label. He contends that the labels used by him are not a colourable imitation of the plaintiffs' labels, and do not amount to an infringement thereof. He denies that the label used by him is of the same size, shape, colour, or appearance as the labels used by the plaintiffs; and he says that the label used by him has a distinct and different appearance from the label used by the plaintiffs, and denies that it is calculated to mislead purchasers or others into the belief that the brandy sold by him is brandy manufactured, or sold, or bottled by the plaintiffs. In effect, the defence asserts the right of the defendant to use and continue to use the body-label complained of.

The issues thus raised by the pleadings were discussed before me for several days, and a great number of witnesses were examined. No witness was examined for the plaintiffs to prove

M. R. 1907.

HENNESSY v. KEATING.

that any member of the public had been actually deceived, and no expert evidence was offered by the plaintiffs to the effect that, in the opinion of the expert, a purchaser would be likely to be deceived by the similarity of the labels. Strong comments were made upon that fact by the counsel for the defendant; and it was said that it was impossible for the plaintiffs to succeed, having regard to the fact that the Court must act upon independent evidence, and that I was asked to decide, in the absence of any independent evidence on the part of the plaintiffs, a matter which was really a matter for experts, and not a matter for the Court.

Mr. Campbell, in opening the case for the plaintiffs, designedly and deliberately elected to stand upon the observations of Lord Macnaghten in *Payton & Co., Limited*, v. *Snelling, Lampard, & Co., Limited* (1), where he expressed his opinion that a mass of irrelevant evidence had been produced in the case. It was said, however, that the *London General Omnibus Co.* v. *Lavell* (2) was conclusive that the remarks of Lord Macnaghten in that case had been misunderstood. Lord Alverstone, C.J., in giving judgment in the Court of Appeal in the latter case, said :—

> " We have no evidence before us as to what is the custom, or practice, or habits of persons who are riders in these omnibuses, nor as to what has grown up to be regarded as the leading feature of omnibuses on any particular route; but we are asked to say that the learned Judge was right in coming to the conclusion that, because he thought the two omnibuses so resembled one another that they might be mistaken the one for the other, that is sufficient evidence to support an injunction in an action for deceit. In the first place, it appears to me that if any such view were to prevail, a very undesirable and erroneous practice might grow up with reference to the viewing or seeing by the Judge of the subject-matter of the action, or anything relating to the subject-matter of an action. It is quite true that, by Rule 4 of Order L., it is provided that the Judge may ' inspect any property or thing concerning which any question may arise ' in the action. But I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea, that the Judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence. Of course, it is quite

(1) [1901] A. C. 311. (2) [1901] 1 Ch. 135, 138.

possible that there may be cases in which all the circumstances connected with the matter in dispute are of such common knowledge, and are so well known to the tribunal, that it may be said that no evidence is necessary: as, for instance, the common case of the make-up of an article which is intended to be sold in shops, though in that case I think that if the Judge, in consequence of there being differences between the two articles, could not say they were identical, he ought not to grant an injunction without evidence before him that the article in dispute was so made as to be calculated to deceive people. Of course, I need scarcely say it is not necessary to show actual deception, because a thing may be calculated to deceive, and the plaintiffs may be justified in coming and stopping the practice before the actual deception has taken place."

That decision, and the observations of the Lord Chief Justice, must be read in reference to the nature and facts of the case; and Farwell, L.J. (then Mr. Justice Farwell), in *Bourne* v. *Swan & Edgar, Limited* (1), comments upon the decision in a way which, if I may respectfully say so, entirely commends itself to my judgment. He says:—

"I have carefully considered that case, and I have come to the conclusion that it really has no bearing whatever on passing-off cases. It is not for me to say whether the Court of Appeal were right or wrong in treating the action as a common law action for deceit; but that is what they did, and their judgment is based on the footing that it is an action for deceit. It appears, not only in the head-note, but at the very beginning of the arguments: the Lord Chief Justice interrupts counsel by saying, 'What right has the General Omnibus Company . . . to bring an action for deceit without evidence of deceit?' He repeats it again in the judgment. He says the fact that 'the two omnibuses so resemble one another that they might be mistaken one for the other was not sufficient evidence to support an injunction in an action for deceit.' This is, of course, quite true of an action for deceit; but it has no application to passing-off cases. The distinction between common law actions for deceit and suits in equity against passing off, and the evidence required therein respectively, is well settled. It is sufficient to refer to the judgment of Lord Westbury in the well-known case of *Edelsten* v. *Edelsten* (1 D. J. & S. 185)—a passing-off case, where he says, 'At law the proper remedy is by an action on the case for deceit; and proof of fraud on the part of the defendant is of the essence of the action: but this Court will act on the principle of protecting property alone, and

(1) [1903] 1 Ch. 226.

M. R. 1907.

HENNESSY v. KEATING.

it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being sold again in the market, the injury to the plaintiff is sufficient. Again, it is not necessary for relief in equity, that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark under the belief that they were of the manufacture of the plaintiff, provided the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other.' Lord Blackburn says very much the same thing in *Singer Manufacturing Co.* v. *Loog* (L. R. 8 App. Cas. 15, 29). It is perfectly obvious, therefore, to my mind, that when the Court of Appeal were dealing with the case of *London General Omnibus Co.* v. *Lavell* ([1901] 1 Ch. 135), they were dealing with it as a common law action for deceit. If it were not so, it would be impossible that they could have excluded the consideration of the ocular comparison of the two omnibuses, having regard to the cases I have referred to in the House of Lords. They could not have overruled the three Lord Chancellors; and if they had done so, they would themselves have been overruled by the subsequent decision of *Payton & Co.* v. *Snelling, Lampard, & Co.* ([1901] App. Cas. 311)."

In my opinion, the evidence of experts on behalf of the plaintiffs in this case was wholly unnecessary. The plaintiffs were entitled, in my judgment, to rely upon the similarity of the two labels, and upon the action and conduct of the defendant, as demonstrating that the label was used by him with the intention of palming-off upon his customers, as Hennessy's brandy, inferior brandy and brandy that was not Hennessy's.

I make no apology for refraining from a minute discussion of the numerous cases cited in argument before me. As Lord Watson says, in the well-known case of *Johnson* v. *Orr-Ewing*(1), "How can observations of Judges upon other and quite different facts bear upon the present case, in which the only question is, What is the result of the evidence?" As Lord Blackburn says, "The ques-

(1) 7 A. C. 219.

tion to be determined is a question of fact." I should be sorry that the learned counsel who discussed—and ably discussed—those cases before me should suppose that I had not considered them most carefully. I have. I have read them all, and considered them all; but the facts in each and all of those cases were different from the facts in the present case.

It appears to me the law is clear, whether this action be treated as one for infringement of the plaintiffs' trade mark, or for an injunction to restrain the defendant from passing off goods calculated to deceive a purchaser; that the purchaser who is the subject-matter of consideration, and who is indirectly protected in this Court, is not necessarily the purchaser who buys with a special knowledge, an expert in brandy, an agent, or traveller for other manufacturers of brandy, or the superior class of person who, feeling unwell, obtains a glass of brandy at a publichouse. The purchaser who is referred to in the passing-off cases, or infringement of trade mark cases, is the unwary or incautious purchaser, the purchaser who has some knowledge of the trade mark or device, and who, having that knowledge, is liable to be deceived—is likely to be deceived—by a similarity or resemblance. "I think we should be cautious in holding that, although a person of intelligence and observant habits might, in a case like this, by exercising reasonable vigilance, escape misleading, there should be no restricting interference to prevent others from being misled. It is a question of degree—of more or less; there can be no rigid rule, and the special facts must be considered in every instance. There are multitudes who are ignorant and unwary, and they should be regarded in considering the interest of traders who may be injured by their mistakes. If one man will use a name, the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs. I do not say that the mere possibility of deception should suffice to make the appropriation improper; but the chance of misleading should be jealously estimated with a view to this consideration, even though ordinary attention might have been enough to protect from

M. R. 1907.

HENNESSY v. KEATING.

mistake." I am quoting the words of Lord O'Hagan in the *Singer Company* v. *Wilson* (1). Now I say in this case, if one man will use a label similar to the label of another whose label has been duly registered, or will use a label resembling it, he must use it under such circumstances, and with such sufficient precautions, that the reasonable probability of errors shall be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs.

Referring again to the decision of Farwell, L.J., in the case of *Bourne* v. *Swan and Edgar* (2), the Lord Justice (at page 224), after stating that proof of actual fraud or deception is not necessary says—

> "What, then, have you to prove? It has been ruled by the House of Lords in the case of the *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* ([1899] App. Cas. 83), and I think it must now be taken to be finally settled, that it is not a proper question to be put to the witnesses—Is the picture or mark complained of calculated to deceive the public? The House of Lords have put it on the ground, and the Lord Chancellor especially has put it on the ground, that that question is the very issue which the Court has to determine. It appears to me that there is also another reason against the admissibility, and that is that I do not see how you can call any individual to give what is in truth expert evidence as to human nature; because, what they are asked in this form of question is, not what would happen to them individually, but what they think the rest of the world would be likely to suppose or believe. They are not experts in human nature, nor can they be called to give such evidence; and, apart from admissibility, one cannot help feeling that there is a certain proneness in the human mind to think that other people are perhaps more foolish than they really are. I do not think that Carlyle is alone in his estimate of the intelligence of the majority of the inhabitants of these islands. Therefore, that is ruled out as a matter of evidence. It only remains, then, to call the evidence of people who can say that they themselves would be deceived. Now, it is obviously extremely difficult to get any such evidence. People are reluctant to admit that they are more foolish than their fellows. The result is that, unless it is left to the eyesight of the Judge, to judge for himself, there is practically no evidence open to the plaintiff in an action of this sort."

And he refers to one or two of the cases which appear to him to

(1) 3 A. C. 394, 395. (2) [1903] 1 Ch. 211, 224.

settle conclusively that it is the eyesight of the Judge that is the ultimate test.

Now, from the moment that the plaintiffs' registered trade mark was handed up to me, and compared by me with the label used by the defendant, I have never entertained a doubt that the man who designed the "Celebrated Old Brandy" label designed it for the purpose of imitating the plaintiffs' label. Mere accidental coincidence is, to my mind, out of the question. Common origin has certainly not been proved. A deliberate design to reproduce the general features of the plaintiffs' label, without committing palpable fraud, appears to me to be evident from what I may call the "hall marks" of the label used by the defendant. The name of "Hennessy," of course, does not appear. If it did, the case would not have lasted five minutes. The mailed arm and hand grasping the battle-axe do not appear. If they did, no counsel would be bold enough, in my opinion, to offer a defence to this action. But in the place of the name of "Jas. Hennessy & Co., Cognac," appear the words "Celebrated Old Brandy," in the precise position in which the name of "Jas. Hennessy & Co., Cognac," appears in the registered trade mark of the plaintiffs, and the place of the battle-axe design is filled by an arrangement of grapes and vine leaves. In size, in shape, in general appearance, in colour, gold upon a white ground, and in vine-leaf border, the impeached label bears (to my mind) as close a resemblance to the plaintiffs' label as an inferior artist, anxious to avoid gross and palpable fraud, could produce. I say "inferior artist," because I agree with some of the witnesses who drew a distinction, on the ground of art, between the plaintiffs' label and the defendant's label, and there is no doubt that one label was executed by a skilled artist, and that the other is more clumsy in design. But in both, in addition to the resemblance in size, shape, colour, and general appearance—you have the vine-leaf border, you have the bunches of grapes, you have the double stem all through, you have what has been called the heraldic bar—and you have the ribbon knot. Of course, if you place the labels side by side, you can detect marked differences between them, but that does not decide the case. It is not a question of whether, taking the two, and comparing them side by side, you can detect differences between them.

M. R. 1907. HENNESSY *v.* KEATING.

The question is, whether, taking the labels as a whole, the label used by the defendant so nearly resembles that of the plaintiffs as to be likely to deceive an incautious purchaser. In reference to this point, I may read the following passage from the judgment of Lord Cranworth in *Seixo* v. *Provezende* (1).

> "It is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *a priori*. All that Courts of Justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule, so restricted, would be of no practical use."

But, if the plaintiffs gave no evidence in this case as to the likelihood of deception, the defendant gave a large body of testimony, some of it valuable, some of it inconsistent with other evidence given on behalf of the defendant, but all of it tending mainly to this, that no person could be deceived, unless the name of Hennessy appeared upon the label, that no matter what points of resemblance there might be between the two labels, no purchaser of brandy in a publichouse or a grocer's establishment in Dublin could be deceived, unless the name of Hennessy was upon the label, because Messrs. Hennessy had so warned the public by advertisements in the London *Times*, in the *Irish Times*, in the Monthly Market List, and in other newspapers, by notices and cautions of various descriptions, that they must look for the name of Hennessy if they wanted Hennessy's brandy, that a child could not be deceived into purchasing as Hennessy's any brandy without a label bearing Hennessy's name. Well, I am bound to say that those advertisements of the plaintiffs have given me more pause than any other circumstance in the case. The plaintiffs have in those advertisements called attention to matters which apparently they considered the absolutely essential characteristics of their trade mark label. They have undoubtedly warned the

(1) L. R. 1 Ch. App. 192, at p. 196.

public in every possible way that, if they wanted Hennessy's brandy, they should look for the name of Hennessy, and for the "sign of the stars"; they continue to inform the public that the stars are used to designate the several classes of their brandy, one star designating six years old, two stars nine years old, and three stars twelve years old brandy. They say (in *The Times* advertisement), "Do not look merely to the stars on the bottle: look for the guarantee of Hennessy's name on the label; and do not buy without seeing Hennessy's name on it." I need not read the other advertisements, the references to the battle-axe, the capsules, and so on. Messrs. Hennessy have undoubtedly warned the public in every possible way that, if they want Hennessy's brandy, they should look for the stars; they should look for the name of Hennessy; and they should look for the label containing the name, and the hand grasping the battle-axe. With regard to this last, I may say that it received scant attention from most of the witnesses.

These advertisements, no doubt, strongly support a great deal of the evidence given on behalf of the defendant; and, except for the circumstances that I have mentioned, and am about to mention, I should be inclined to think that the plaintiffs had really no great need for seeking the intervention of this Court. But it has been proved in evidence that, as regards the one-star brandy, the starring is only a matter of recent occurrence, that up to a period estimated as from three to five years ago there was no star upon what is now known as the one-star brandy; and it was also proved that there are at present being sold in grocer's shops in Dublin, bottles of genuine Hennessy's one-star quality brandy with the body-label, but without the star. I do not think that the defendant can rely upon the fact that he did not complete the case against himself by putting a star upon the label. If he had done so, I think the case would be clearer than it is against him, even though the star is no part of the plaintiffs' registered label. He did not do so; but I do not think that, under the circumstances, he can rely upon the absence of the star as a defence to the action, especially as the plaintiffs disclaimed any right to the exclusive use of the star devices. Nor, in my opinion, can he rely upon the omission of the name of Hennessy, or the omission of the hand

M. R. 1907.

HENNESSY v. KEATING.

grasping the battle-axe, because, in my judgment, his conduct and action demonstrate that he, as a grocer and publican in the city of Dublin, notwithstanding those omissions, believed that the affixing of this "Celebrated Old Brandy" label to the bottles that he placed upon the shelf in his publichouse would be calculated to deceive and mislead an unwary purchaser.

I decide this case upon its own particular facts. Mr. O'Connor made an eloquent appeal to me on behalf of the defendant to say that he came into and left this Court an upright, honourable man; that though his evidence as given in the box was unsatisfactory, his conduct was that of a truly honourable and right-minded man. I regret to say that I cannot take that view of the defendant's conduct and evidence. I do not believe one word of the story of the discovery of those labels after a period of several years—*i.e.* their accidental discovery. Upon the defendant's own evidence, and the evidence of his assistant, I draw the inference of fact that those labels were procured by the defendant and placed in the drawer in which labels of various descriptions were kept, for the purpose of being put on bottles which were got up in imitation of the Hennessy bottles, and which were placed on the shelf beside the Hennessy bottles. That I regard as one of the strongest features of the case against the defendant. His own testimony is that on that shelf there were some bottles of Hennessy's brandy, there was at least one bottle of Martell's brandy, and that between the two, there were bottles of this "Celebrated Old Brandy." Now, no one on the face of the earth could mistake Martell's label for Hennessy's label. Martell's label is coloured blue, and the capsule is blue; but in the case of this "Celebrated Old Brandy" the colouring and the whole get-up of the label were, in my opinion, such as to present to any customer in the shop, except a very expert customer, the impression that the bottles which were ranged alongside the real Hennessy were also Hennessy's manufacture. I cannot lose sight of the fact that the bottles were capsuled in a way similar to the way in which the real Hennessy bottles were capsuled. The act of the defendant in placing those bottles side by side with the genuine Hennessy bottles on the shelf behind the counter, and having, by way of comparison, with them Martell's brandy, satisfies my mind that the view I have taken of

the case is the true and correct one, and that whatever may be said for other traders in the city of Dublin, this particular defendant obtained those labels, used those labels, and exposed the brandy for sale in bottles on which those labels were, with the idea that there were some fools left in the world, some incautious, some unwary persons, who could be deceived, and who would be deceived, by the way in which this inferior brandy was got up.

One of the other circumstances personal to the defendant in this case is the fact that, after he had intimated that he was willing to cease the use of the labels, and though he had stated under his hand that he did not want to use them, and that the shippers from whom he bought the brandy were willing to supply him with labels free, he bought or ordered from an eminent firm in this city a number of vine-leaved bordered labels, as to which I shall only say that they bear a singular resemblance to the "Celebrated Old Brandy" label. The explanation that the defendant gave of his letter of the 5th March, 1906, was not satisfactory to my mind. This was his letter:—

> "In reference to your letter, I have shown my label to several parties, and in each case I was told that they could not possibly see how anyone could think that same was like Messrs. Hennessy's. However, if it would please you in any way, I have no objection to giving up the label, as I have only a few in stock, *and the Cognac firm I buy from is only too glad to supply me with their labels free.*"

Now the labels which the Cognac firm were willing to supply free were such as would prevent the possibility of mistake or deception; and, in my opinion, if the defendant had been the honest trader his counsel sought to represent him, he would have taken those labels from the Cognac firm—he could have got them free, and no one could have said he wanted to palm off inferior brandy as Hennessy's brandy. But, instead of doing that, he sent an order for 500 gold labels, and the circumstance that he at first denied that when he gave that order he knew that the shippers would give the labels free, is not to be reconciled with the ascertained facts of the case—to say the least of it—as that letter of the 5th March, 1906, was, in point of time, considerably prior to the 30th August, 1906, or some time in August, 1906, when the 500 brandy-

M. R. 1907.

HENNESSY v. KEATING.

labels were supplied by the Dublin firm. He says, "I did not know at the time I ordered from Hely that I could get the labels free from my shippers." That was his original evidence, and no satisfactory explanation of it was given. All I can say is that, if I have done the defendant any wrong in the observations I have made with regard to him, he has himself to blame; for indeed, as his counsel said, I never saw a worse witness in the box, though I regard the matter in a different point of view.

It would not be right to conclude my judgment without referring to the testimony as to the user of this "Celebrated Old Brandy" label, given by a great many of the respectable grocers and publicans and persons interested in the licensed trade in this city. This case seems to be regarded by them as a case of interest to the trade generally. In my opinion, it is not of any importance to the trade generally; and why? Because the trade, as a body, require no certificate of character from me. The witnesses who were examined, one after another, impressed me with their intelligence and honesty. But, when all is said and done, what did they prove? I do not intend to go into details, nor do I profess to give the evidence of each of the witnesses; but the result of the evidence of the trade (in my opinion) was that this "Celebrated Old Brandy" label had been in use largely in former years, but that one respectable trader after another had discontinued the use of it. I was greatly struck with the evidence of one witness, whose evidence was otherwise distinctly favourable to the defendant. Mr. Smith, a publican, stated that he knew the two labels; that he did not think a customer would be likely to be deceived; that the label used by the defendant was different altogether from the plaintiffs' label. He was, I think, the one witness who stated that he preferred Martell's brandy to Hennessy's—all, or at all events most, of the other witnesses united in praising Hennessy's; but he said he did not think a publichouse-keeper in Dublin would sell a customer brandy that was not Hennessy's, if Hennessy's was asked for.

Well, I almost agree with him in that; but I cannot reconcile the conduct of this defendant with that high standard of honour and integrity attributed by Mr. Smith to the general body of licensed traders. I asked Mr. Smith, Would it be for the interest

of the public and of the publicans if this "Celebrated Old Brandy" label was done away with, and an entirely distinct label adopted by those who sold brandy that was not Hennessy's, either in bottles or retailed in glasses in publichouses? And he made me a very remarkable answer. He said it would be (he thought) for the interest of the public and the publicans if the label was entirely extinguished; but Messrs. Hennessy, he said, should go for the big shippers abroad—for the big men, and not for the little men. Well, that may be so. It may be a hard case to punish a man so severely as the defendant in this case must be punished, perhaps for one single departure from the path of truth and right. But be the defendant a small man in the way of trade, or a big man—be he a publican in the city of Dublin or a French manufacturer and shipper, the law administered by this Court must be the same.

Another witness who was examined gave some remarkable testimony. His name was Pierce Ryan. He stated that he had been in trade for several years, and had a good deal of experience in the trade, that he had used the "Celebrated Old Brandy," label for a couple of years, and that Messrs. Hennessy threatened proceedings, but that he refused to pay costs, and the matter dropped. He added that he thought Keating's customers would not be deceived by the label, and that the only resemblance he saw between the two labels was the colour. He said he had only eleven bottles of the "Celebrated Old Brandy" in stock when he was challenged.

The statement that this trader had used the "Celebrated Old Brandy" label in the teeth of the warning of Messrs. Hennessy, seemed certainly a startling circumstance, but what was the fact? A letter was produced from Mr. Ryan's solicitor, Mr. Michael Bergin, dated January, 1905, written to the solicitors for the plaintiffs, in which he says: "Mr. Ryan instructs me that the purchaser was informed by Mr. Ryan's assistant that the brandy was not the manufacture of your clients, and that he recommended the purchaser to take brandy of your clients' manufacture. Mr. Ryan sells a great deal of your clients' brandy. He regrets having used any label which you consider an unlawful imitation of your label, and as proof of his regret he has taken down from his shelf

M. R. 1907.

HENNESSY v. KEATING.

the remaining bottles, and *undertakes not to expose them for sale again.*"

The evidence produced on behalf of the defendant has convinced me, as a juror, that respectable grocers and publicans in Dublin, when challenged, have withdrawn this "Celebrated Old Brandy" label; that not only grocers and publicans, but wine merchants, have withdrawn it when their attention was called to the fact that it so closely resembled the plaintiffs' trade mark as to be calculated to mislead purchasers.

In my opinion, the plaintiffs have succeeded in this action, and are entitled to judgment. The number of these "Celebrated Old Brandy" labels now in the possession of the defendant may be small or large: I am not prepared to accept the defendant's statement as to the number at all; but whether the number be small or large, they must be delivered up, and delivered up on oath. The defendant of course must pay the costs.

There was one matter that I intended to allude to. It was this. A large label, or framed show placard, was produced, and it was suggested, indeed it was argued strenuously, that the fact that that label was exposed to public view in the defendant's shop, showing the mailed arm and hand grasping the battle-axe, with the name "Jas. Hennessy & Co." and the genuine trade mark, negatived the idea that the defendant could have intended to pass off the brandy of other firms as Hennessy's manufacture. I took, and take, as a juror, exactly the opposite view. I consider that that label, so exposed to the view of every customer in the shop, coupled with the position on the shelf of the bottles containing inferior brandy and labelled with the "Celebrated Old Brandy" label, so far, from negativing any intention on the part of the defendant to deceive, was calculated to suggest to any purchaser that what he was going to get in that establishment was James Hennessy & Co.'s brandy. I merely mention that, because it might be thought that I had overlooked the matter altogether, which I had not.

R. W. L.

The defendant appealed (1).

Appeal. 1907.

HENNESSY v. KEATING.

Ronan, K.C., and *James O'Connor* (with them *Moriarty, K.C.*), for the appellant.

Gordon, K.C., and *The Right Hon. J. H. Campbell, K.C.* (with them *Blood, K.C.*, and *Figgis*), for the respondents.

Nov. 19–21, 25. Dec. 10.

The arguments were substantially the same as before the Master of the Rolls.

THE LORD CHANCELLOR:—

Dec. 10.

The plaintiffs are the well-known manufacturers and exporters of brandy, carrying on business at Cognac, in the Republic of France; and they complain that the defendants have been, and are, selling and offering for sale, brandy contained in bottles bearing body-labels which are colourable imitations of a registered trade-mark label, the property of the plaintiffs, and amount to an infringement of it; and they claim an injunction to restrain the defendants from infringing such trade mark, or selling or offering for sale, brandy in bottles bearing those labels, which they allege are colourable imitations of the plaintiffs' trade-mark labels, and are calculated to lead purchasers to the belief that the brandy sold in such bottles is manufactured or supplied by Hennessy & Co.

This involves the necessity of allegation and proof that the label on defendant's bottles is substantially such a colourable imitation of plaintiffs' label that it is calculated to deceive; in other words, that a bottle bearing the defendant's label could be passed off easily without fraud, otherwise than by the label itself, as a bottle of plaintiffs' bearing Hennessy's label.

The statement of claim does not allege any actual fraud on the part of defendant or actual attempt to deceive the public, save so far as it could be inferred from the use of the label; and there was no proof in the plaintiffs' case of any purchaser having been, in fact, deceived, or having bought defendant's goods in the belief that he was buying those of Hennessy. In fact, it was

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ-GIBBON and HOLMES, L.JJ.

Appeal. 1907.

HENNESSY v. KEATING.

The Lord Chancellor.

admitted by plaintiffs' principal witness that they could not produce any such evidence.

They proved by their manager three certificates of registration of their trade mark, dated 27th July, 1906, in which a previous use for twenty years was claimed. These included the whole labels—the bottle one and the neck-label with three stars; but in a further registration they disclaimed any right to the exclusive use of those star devices, on the ground that they were commonly used in the trade concerned. This witness also proved that the use of the white and gold label was common in the trade. The plaintiffs also proved a purchase in the defendant's shop of a bottle of his brandy bearing the impeached label, but no neck label, and they proved it was a much inferior brandy; and they also proved the price of their own, regulated by the number of stars affixed according to the age of the brandy—one star, six years old; two stars, nine years old; and three stars, twelve years old. Advertisements of Hennessy's brandy and cautions regarding it were also proved: that in the *Irish Times* of 24th May, 1906, being:—"All dealers and purchasers of brandy are informed that Jas. Hennessy & Co.'s case brandy is bottled only in their stores at Cognac, and are particularly requested to observe that the corks, labels, and capsules correspond in the following particulars:—Every bottle has affixed to it their registered trade mark, bearing in the middle their firm, Jas. Hennessy & Co., Cognac, printed in gold letters on a white ground, encircled by a wreathing of vine leaves and grapes, in the upper part of which is shown an arm embossed in armour holding a battle-axe. The label is squared by a broad line, and at the bottom, in small, black print, 'Registered at Stationers' Hall,' the whole printed in gold. The corks in such bottles are branded Jas. Hennessy & Co., and with stars thereon to denote the quality of the brandy therein; and as an additional guarantee they now use a patent capsule, on the head of which their firm surrounding the trade mark is again placed. The capsule bears a yellow rim round the neck of the bottle. Their cases are marked Jas. Hennessy, Cognac, and the above trade mark over the name."

It will thus be seen what they themselves prominently called attention to. The Master of the Rolls granted an injunction upon

his own inspection of the two labels, and the view which he formed upon their similarity. The appellants' counsel first dealt with this case as it stood at the close of the plaintiffs' evidence, and contended that he was entitled to have the action dismissed on the authority of the decision in *The London General Omnibus Company* v. *Lavell* (1), where the learned Judge, Farwell, J., decided upon his own inspection alone of the omnibus said to be the colourable imitation, and he insisted there was an absolute rule of law to be deduced from the decision, that wherever there is a substantial variation from identity, as undoubtedly there is in this case, there ought to be some evidence to assist the Judge. That case itself is not a satisfactory one, as it was dealt with, except perhaps by Rigby, L.J., as if it were an action of deceit, and it has occasioned some difficulty in its application. My own opinion is that each case depends on its own special facts. There may be many on which evidence will not help; and I quite agree that a statement of a witness in the form of the question which the Judge has to try furnishes no legitimate guide, and in the bald form is not admissible.

In the case of *Re Christiansen's Trade Mark* (2), the Master of the Rolls says:—"It is quite true that you must not try it exclusively by your eyes. It is equally true to my mind that you must not try it exclusively by the evidence. You must use both. . . . You must look upon it with your eyes and with your own powers of thought and opinion, accompanied with and, if the evidence is satisfactory to you, directed by, the evidence which is given. But when you come to consider the evidence, you, being the person to decide on the effect of it, must not only look at what people say, but you must exercise your own opinion as to whether what they are saying is sensible, or can be accepted." So, in *Alaska Packers' Association* v. *Crooks* (3), the learned Judge says, that "wherever there is a substantial variation from identity there ought to be some evidence"; but "where the similarity is such that it would appear to the eye quite independently of the surrounding circumstances, then you do not want the proof."

(1) 18 R. P. C. 74; [1901] 1 Ch. 135. (2) 3 R. P. C. 54, at p. 60.
(3) 18 R. P. C. 129.

Appeal. 1907.

HENNESSY v. KEATING.

The Lord Chancellor.

In one of the last cases, *Schweppe's Soda Water Case* (1), Mr. Justice Warrington puts it:—"It seems to me that each of these cases must be looked at by itself; and the Judge, looking at the label or the get-up or device, whatever it may be that is complained of, with such assistance as to the practice in the trade as he can get from the witnesses, must decide for himself whether the article complained of is calculated to deceive or not." I think it was unfortunate that the Master of the Rolls treated the case as one in which he was not even justified in hearing expert evidence whether it was calculated to deceive; but, upon the abstract question, I think the view of Mr. Justice Farwell in *Bourne* v. *Swan & Edgar* (2) is the more correct one.

Even if the Master of the Rolls in this case should have required from witnesses some evidence as to trade practices or otherwise, I think the case must always practically come round to the consideration of the label itself; and I am content to decide this case upon it with the aid of a few proved or admitted facts. I may further observe that the defendant went into evidence, and that was before the Master of the Rolls when he came to deliver his judgment. The two labels are before me. The 4th paragraph of the claim accurately describes that of the plaintiffs—a body-label, square in shape, printed in gold on a white ground, in the centre of which appears the name of the plaintiffs' firm, "Jas. Hennessy and Co., Cognac," surrounded by a border, also printed in gold, of vine leaves and grapes in the form of a garland tied at the base with ribbon, and surmounted by a mailed arm and hand grasping a battle-axe.

The Master of the Rolls states his grounds thus:—In both, in addition to the resemblance in size, shape, colour, and general appearance you have the vine-leaf border; you have the bunches of grapes, you have the double stem—all through you have what has been called the heraldic bar, and you have the ribbon knot.

The Master of the Rolls makes rather light of the omission of the name Hennessy & Co., Cognac, and the battle-axe, so strongly relied upon by plaintiffs in the advertisement of their goods, for reasons which he states. [The Lord Chancellor read from the judgment of the Master of the Rolls, *ante*, p. 65.]

(1) 22 R. P. C. 113, at p. 119. (2) [1903] 1 Ch. 211.

Appeal. 1907.

HENNESSY v. KEATING.

The Lord Chancellor.

I cannot think that when the defendant was at first willing to discontinue the labelled bottles, of which he had so few, rather than go to law with a wealthy plaintiff this should be pressed against him; and as to the second ground, it is abundantly clear that there were labels in existence, "Celebrated Old Brandy," which he need not "procure" or "get up" or "design." They were of a class of stock labels which were proved before us. In truth the facts are the following:—

There are in this brandy trade, which has its principal home at Cognac, two well-known, and much sought for and expensive brandies—James Hennessy & Co.'s and Martell's. There are also cheaper and inferior brandies manufactured, which are largely bought; and it would be against the interest of the public to give a monopoly to either Hennessy or Martell; but their trade mark must be protected from infringement. As regards such cheaper brandies it has always been the practice to provide for the bottles in which they are sold stock labels, and the label impeached was proved to be a stock label. Of these, leaving out some altogether dissimilar to the plaintiffs', six at least have been produced to us. I may mention "Celebrated Old Brandy," "Finest Old French Brandy," "Camille Laporte, Cognac," "Ehrmann Frères, Cognac," "Boulestin & Co., Cognac," and "Marteleur Frères, Cognac."

The label "Celebrated Old Brandy" has been in existence for twenty-six years; at least one was printed by Lyons & Co. A witness proved to printing it from 1879 to 1898, when Lyons went out of business, and it is proved to have been in common use. One of the "Celebrated Old Brandy" labels was produced to a witness; I may call it No. 2. It differs somewhat from the impeached one. The "Finest Old French Brandy" label was printed by Hely & Co. for twenty-six years. Mathews proves he saw the impeached label twenty-six years ago in general use. In 1897 the defendant purchased his present premises, with the stock in them; and in December, 1905, he purchased a quarter cask of brandy from Dolores Frères, and in January, 1906, when bottling it he put the impeached label, of which the assistant found some in his drawer, on eleven or twelve bottles as a stock label. It is charged against him that he did not get labels from Dolores, who would have supplied them free; but those, from their form and

Appeal. 1907.

HENNESSY v. KEATING.

The Lord Chancellor.

language, would not have been stock labels; and on 30th August, 1906, he gave an order to Hely for 500 stock labels "Finest Old French Brandy." Hely had printed those for twenty-six years. It is clear that defendant need not get the impeached label designed for himself, nor did he get Hely's designed for himself. It was in existence as a printed label long before it was put on the bottles. When he was asked for the name of the printer, he did not give it, not wishing, apparently, to put the printer in a possible difficulty. All this is used against him as evidence of fraud, but the case we have to deal with is a simple "passing-off" case, as they are called. A great deal of evidence was given on the part of defendant as to this label, and as to whether it was calculated to deceive. It is necessary for one of us to go through that evidence with some minuteness, and Lord Justice FitzGibbon has undertaken that task. Of these witnesses I may observe that Mathews and Lyons are entirely independent ones.

Returning to the two labels—What is common and what is dissimilar? What is common is the ground, a white square, with printing in gold and gold rim, and wreaths of surrounding vine leaves and grapes, with a true lovers' knot uniting them below, but the impeached label has not on it the prominent words "Jas. Hennessy & Co., Cognac," nor the battle-axe on the heraldic bar, nor the neck-label or stars; though those two last are not claimed now, and when the witnesses for the defendant were asked what they relied on as proof that there was no likelihood of deception, most of them pointed to the name, Jas. Hennessy & Co., and place, Cognac, and the battle-axe, which are prominent features of plaintiffs' trade mark in their registration and advertisements. The white and gold ground are common to the trade, and so are wreaths of vine-leaves and grapes bordering the label; these show the brandy is produced from grapes, and they are in use in Dublin for thirty years according to one witness. I quite agree that the label must be judged as a whole, and that it is not enough to point to dissimilarities in part of the trade mark, and say because these are absent and the rest are common to the trade there is no similarity calculated to deceive. "If," as Lord Justice Lindley says in *Christiansen's Trade Mark Case* (1), "the dissimilarity is so small,

(1) 3 R. P. C. 60.

and the common features are so numerous, that the two as a whole are similar, the dissimilarity goes for nothing."

Therefore it is in each case a question of degree; but what stands out prominently here inside the wreath of vine-leaves common to the brandy trade, is "Jas. Hennessy & Co., Cognac," and I cannot myself see how, when fraud and actual intention to deceive are absent, the use of the label would be likely to cause a mistake. The way the bottles were used was: there were bottles on the shelf behind the shopman, and 5 or 6 feet from the customer—some Hennessy bottles—some Celebrated Old Brandy—and one Martell. A customer comes in and asks for a bottle of Hennessy or a glass of Hennessy; I cannot imagine how the shopman could make a mistake by reason of the presence of this label. And when we speak of a customer, we must, according to the decisions on this point, deal with one or include one, not an expert, or in the trade, but a man of ordinary intelligence who goes in, not expecting deceptions, and to that extent unwary, but who knows generally the characteristics of Hennessy's, not cautiously looking out for differences from others, but treating the label fairly. If there is actual fraud or a designed covering up of the bottle, *cadit quæstio*. If a shopman covers up part of a bottle, this is actual fraud. It is easy to be dishonest. It is not there the label which brings about the mistake. It must be remembered that when the plaintiff does not allege and prove actual deception, the onus is on him to satisfy the Court that there is such reasonable probability of deception by the label alone as will justify interference (1). Lord Macnaghten in *Payton* v. *Snelling* (2) says: "When a person comes forward to restrain a colourable imitation of this sort in a case like this, and when he cannot prove that the defendants have tried to steal his trade, he has to make out beyond all question that the goods are so got up as to be calculated to deceive." This is the converse of those cases in which leave is sought to use a particular trade mark, or the cases where the plaintiffs make out by evidence a case of actual deception; for there the question of resemblance is decided by the test of facts, and I am willing

(1) Sebastian, 128. (2) [1901] A. C. 308, at p. 310.

Appeal. 1907.

HENNESSY v. KEATING.

The Lord Chancellor.

to discount the evidence of those trade witnesses who swore that in their opinion (honestly given, as the Master of the Rolls says) the label is not calculated to deceive by the fact that we must deal with the case of the ordinary customer. So far as the evidence of the label being calculated to deceive goes, it is all in favour of defendant. Of course the Judge must not surrender his judgment. The exhibition of the big placard in the defendant's shop has been used by the Master of the Rolls as an argument against the defendant. I can well imagine such a conclusion in a case of actual fraud; but the fairest way to deal with it is, I think, to treat it as an invitation to purchasers of Hennessy's brandy to look out for the battle-axe.

Upon the whole it seems to me that the prominent dissimilarities which I have pointed out so largely outweigh what is upon the label of things common to the trade as to create a dissimilarity on the whole sufficient to protect the defendant. We cannot stop the use of all stock labels, or of stock labels bordered by a wreath of vine-leaves. I have not referred to the decision of Mr. Justice Kekewich in *Hennessy* v. *Dompé* (1), because it has been formally reversed on appeal under peculiar circumstances. I think it should be laid aside altogether as an authority for either side. "Cognac," however, was on the impeached label there.

In my judgment the plaintiffs have failed to prove their case, and the appeal should be allowed and the action dismissed.

FITZ GIBBON, L.J.:—

The question on which we differ from the Master of the Rolls is one of fact: it is, in the words of the statement of claim, whether "the 'Celebrated Old Brandy' label, as used by the defendant, is an infringement or colourable imitation of the plaintiffs registered label, or is so contrived as to be calculated to lead purchasers to believe that the brandy sold under that label was the plaintiffs brandy." The burden of proof rests on the plaintiffs, and though the words "calculated to mislead" are taken from a statute, I prefer to put the question in Lord Cranworth's words, *Seixo* v. *Provezende* (2): "Whether the defendant has adopted

(1) 19 R. P. C. 333. (2) L. R. 1 Ch. App. 192, at p. 196.

a trade mark so resembling that of the plaintiffs as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled." I prefer these words because "calculated," the statutory word, like "contrived" in the statement of claim, seems to indicate an evil intention, which is not essential to the cause of action. If the mark is likely to mislead, whether used innocently or with the object of misleading, I should hold the plaintiffs entitled to protection. In this case, innocent adoption of an imitation of the plaintiffs label is out of the question, and if the defendant had adopted the "Celebrated Old Brandy" label with the intention, or even with the hope, of by it passing off upon his customers inferior brandy as Hennessy's, I would not spend time in discussing whether the differences in the labels were so great that no ordinary customer would be deceived; I should assume that the resemblance which the defendant intentionally adopted — if he did so for the purpose of misleading—was sufficient to effect his fraudulent purpose; or at least that he should not be heard to say that the resemblance was insufficient to effectuate his purpose. In such a case, the plaintiffs would not be bound to wait until they could prove a particular instance of successful fraud, before coming to equity for an injunction against the continuance of the fraudulent attempt.

The main ground of the decree under appeal appears to me to be that the Master of the Rolls has found the defendant guilty of intentional fraud, dishonest trading, and false swearing. He says, that from the moment the plaintiffs trade mark was compared by him with the defendant's label, he never entertained a doubt that the man who designed the "Celebrated Old Brandy" label "designed it for the purpose of imitating the plaintiffs label"; that "the impeached label bears as close a resemblance to the plaintiffs' label as an inferior artist, anxious to avoid gross and palpable fraud, could produce," that

> "the conduct and action of the defendant demonstrates that he believed that the affixing of this 'Celebrated Old Brandy' label to the bottles that he placed upon the shelf in his publichouse would be calculated to deceive and mislead an ordinary purchaser."

Appeal. 1907.

HENNESSY *v.* KEATING.

Fitz Gibbon, L.J.

And that his conduct was not that of "an honourable and right-minded man." He also said—

> "I do not believe one word of the story of the accidental discovery of those labels after a period of several years."

Discrediting the defendant and his assistant Daly, he draws the inference of fact

> "that those labels were procured by the defendant, and placed in the drawer in which labels of various descriptions were kept, for the purpose of being put on bottles which were got up in imitation of Hennessy's bottles, and placed on the shelf beside the Hennessy bottles, and that the whole get-up of the label was such as to present to any customer in the shop, except a very expert customer, the impression that the bottles which were ranged alongside the real 'Hennessy' were also Hennessy's manufacture."

Differing, as I do, from these definite conclusions of fact, and respecting, as I do, the judgment of the Master of the Rolls, I must look for some explanation of our difference of opinion. I find it in the mode in which the Master of the Rolls dealt with the evidence given on behalf of the defendant. He has treated what he calls the "expert evidence" as, to a great extent, inadmissible, taking it to be so finally settled by the House of Lords in *The Manchester Brewery Case* (1), on the ground that the question whether the design complained of is calculated to deceive the public is the very issue which the Court has to determine. I respectfully submit that this is a misconception of the judgment to which he refers, and that Lord Halsbury did not lay down what has been attributed to him. The following passage of Lord Halsbury's judgment will be found at page 84:—

> "The truth is, that when one comes to see what the real question is, it is in a single sentence. Is this name so nearly resembling the name of another firm as to be likely to deceive? That is a question upon which evidence of course might be given, as to whether or not there was another brewery either in the one place or in the other, or whether there were several breweries nearly resembling it in name; what the state of the trade was, and whether there was any trade name: all those are matters which are proper to be dealt with upon evidence."

(1) [1899] A. C. 83.

Insert "labels" for "breweries," and that sentence is applicable to the present case. Then Lord Halsbury says:—

> "But upon the one question which your Lordships have to decide —whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason, that that is the very question which the Court has to determine."

Lord Macnaghten says the same thing two years later, in *Payton* v. *Snelling* (1), and shows that Lord Halsbury did not lay down what the Master of the Rolls appears to think he did. He says:—

> "A great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions, and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would. But that is not a matter for the witness; it is for the Judge. The Judge, *looking at the exhibits* before him, and also *paying due attention to the evidence adduced*, must not surrender his own independent judgment to any witness."

How far Judges may act upon their own knowledge is well put by my brother Holmes, L.J., in *Byrne* v. *Londonderry Tramway Co.* (2):—

> "Judges must bring to the consideration of the questions they are called on to decide their knowledge of the common affairs of life, and it is not necessary on the trial of an action to give formal evidence of matters with which men of ordinary intelligence are acquainted."

In *The London General Omnibus Company* v. *Lavell* (3), Lord Alverstone, C.J., recognized that in such cases as *The Manchester Brewery Case* (4), no evidence that a particular thing was calculated to deceive might be required. That was merely a case of the comparison of the two names, which might be said to speak for themselves:—

> "Here" (he says) "the Court is obliged to make itself acquainted with, or to make an assumption as to, what are the habits of people

(1) [1901] A. C. 308, at p. 311.
(2) [1902] 2 I. R. 457, at p. 480.
(3) 18 R. P. C. 74.
(4) [1899] A. C. 83.

Appeal. 1907.

HENNESSY v. KEATING.

Fitz Gibbon, L.J.

travelling in omnibuses, and the matters which are important for their consideration; and, in my opinion, it is quite impossible to say that that can be done by simply looking at the omnibuses, both of which have been running upon the same road for a good many years, and then coming to a conclusion, without any evidence at all which would lead the Court to think that passengers would be misled by this or that alteration or resemblance."

Farwell, J., in *Addley Bourne* v. *Swan & Edgar* (1), considered this to be in conflict with *Payton* v. *Snelling* (2), and said that the judgment in the Omnibus Case was based on the footing that it was an action of deceit, and had no application to passing-off cases. Of course he is right that, in an action for deceit, a judgment for the plaintiff must rest on proof of actual deceit, and no Judge can supply evidence of that *ex informata conscientia*; but the judgment in the Omnibus Case may apply to cases in which proof of actual deceit is not necessary, and I respectfully say that though Judges, whether at law or in equity, cannot delegate to so-called experts the pronouncement of the only authoritative opinion upon the question at issue, parties are entitled to give, and Judges are bound to consider, wherever it is material, the evidence of those who are better acquainted than they are with the circumstances under which the question arises, before deciding either whether actual deceit has been proved, or whether any particular resemblance is likely to deceive. I do not understand Lord Alverstone to have held otherwise.

Fortunately, the whole matter, as far as we have now to deal with it, is stated in the judgments of the House of Lords, in the two cases in which Orr-Ewing's Trade Mark was under consideration, in terms peculiarly applicable to the present case (3). That Trade Mark came before the House of Lords in 1879, on an appeal from a refusal of the Registrar of Trade Marks to register it. An elaborate judgment was delivered by Lord Cairns, L. C., in which he says:—

> "The definition of a trade mark is given in section 10. It must consist of one or more of the following essential particulars—(1), a name of an individual or firm, printed, impressed, or woven in some particular

(1) [1903] 1 Ch. 211.
(2) [1901] A. C. 308.
(3) *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479.

and distinctive manner; or (2), a written signature, or copy of a written signature, of an individual or firm; or (3), a distinctive device, mark, heading, label, or ticket. One or more of these particulars must occur to constitute a trade mark, and there may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures. . . . Looking to the labels of the appellants, and to the evidence with regard to them, there are several matters about them which, as it seems to me, are ineffectual to create any distinctive device to the benefit of which they can be entitled. The triangular shape of the tickets, their green colour, the print on the green in gold leaf, the curtain suspended from two animals in the corners, and the words 'Prime Turkey Red,' are all matters which are shown by the evidence . . . to have been in common use in respect of goods of this kind by many houses in the trade for a great number of years.

"*Prima facie*, these figures which I have thus described would appear to me, with the name and address of the firm added, to constitute in each case a distinctive device within the meaning of the Act, and thus to be a trade mark authorized to be registered under the Act.

"Whether, again, a trade mark for goods of this description, consisting merely, or principally, of an arrangement of elephants or lions, would be a desirable form of mark to maintain against infringers, is also a different question. It may, and probably would be the case, that no registration by the appellants of these marks would be allowed to interfere with the continued user, by other houses, of marks with slightly differing arrangements of the same, or similar animals, which they have heretofore used, and it may be that, from the numerous forms in which these animal figures have been used on labels of this kind, nothing short of a very close imitation of the particular arrangement adopted by the appellants would constitute an infringement.

"If your Lordships agree with me in thinking that the marks of the appellants, limited as I have supposed, are marks in respect of which the Registrar should receive the application to register under the Act, it will be sufficient that you should direct him to proceed to discharge his duty in this respect."

And the form of the order was that the Registrar should proceed with the application of the appellants to register as trade marks the distinctive device of animals in said label, with the name and address of appellants firm.

Within two years after that decision, that very trade mark again came before the Lords in an action for infringement: *Johnson* v. *Orr-Ewing* (1).

(1) 7 App. Cas. 219.

Appeal. 1907.

HENNESSY v. KEATING.

Fitz Gibbon, L.J.

Lord Selborne says (page 221) :—

> "During the whole time, from the commencement of the use of this ticket or label to 1875, there was no other trade mark in use either at Bombay or at Aden or (so far as appears from the evidence) anywhere else, having those essential and distinguishing characteristics upon which the plaintiffs rely, viz., the device of two elephants in the upper corners of a green and gold ticket, with a drooping cloth or banner suspended between them, and a certain inscription thereon."

I refer to these judgments on account of the close analogy between the evidence which, in *Orr-Ewing's Trade Mark* (1), was dealt with by the House of Lords, and the evidence that was rejected in the present case by the Master of the Rolls. Lord Selborne says (page 226) :—

> "It is true that deception in fact is not in this case proved; but there is a large body of trustworthy evidence to the effect that such deception would be liable, and very likely, to occur, at all events with the more ignorant class of consumers, particularly in the up-country districts."

Lord Watson says (page 232) :—

> "There is a great deal of evidence in this case bearing upon the possibility and probability of the use of the ticket complained of leading to the appellants yarn being sold as the manufacture of the respondents. It is no doubt evidence of opinion, but the opinion of persons more or less conversant with the trade in Turkey Red yarn carried on in the markets of Bombay and Aden; and these observations apply to the witnesses adduced on both sides."

Taking these cases for my law, and holding that they authorize the use, within clear limitations, of evidence of the very class which was given in this case on behalf of the defendant, I proceed to consider that evidence, much of which was treated as inadmissible, and more was but scantily considered, by the Master of the Rolls.

The first point to be considered is the extent to which the resemblance between the two labels in question arose from their both containing features which (in the very words used by the plaintiffs themselves, when disclaiming the "star device" on re-

(1) 4 App. Cas. 479.

registering the label) were "commonly used in the trade concerned with the goods to which their trade mark was applied." *Orr-Ewing's Case* (1) shows that such features are not protected by registration, and that this tendency to mislead is a legitimate subject of "expert evidence."

But still more important is the evidence which affects the charge of false swearing against the defendant and his assistant, Daly. Nothing is said by the Master of the Rolls of the testimony of Lyons and of Matthews, who prove that the defendant's impeached label was printed up to 1898, but not afterwards, as a stock label by a Dublin firm which was wound up in that year; and he says very little of the mass of evidence which proves that "Celebrated Old Brandy" labels have been known in the trade in Dublin for the last thirty years at least; that they were not all printed from the same stones is proved by the fact that the "Celebrated Old Brandy" label, No. 2, which was shown to the witnesses, though almost identical in appearance, was not produced from the stones which formerly belonged to Lyons and Sons, and from which the label on the bottle bought from the defendant is proved to have come. It is an indisputable fact that many labels have been, and still are, commonly used throughout the trade, by many firms other than the plaintiffs, all resembling the plaintiffs' label at least as nearly as does the defendant's label. Upon the determination of the question whether, and how far, each or all of the ten labels of this class that are now in proof is or is not likely to deceive an ordinary customer, it appears to me that the evidence of experts, and of persons acquainted with the trade in which all these labels are used, and with the mode of buying and selling brandy, is not only admissible, but ought to be helpful to the Court; and no evidence has been offered by the plaintiffs to meet that given for the defendant on this branch of the case. As a juror, I find that the shape, size, colour, and general arrangement of all these labels—the features which Lord Cairns considered non-essential in *Orr-Ewing's Trade Mark* (1)—are so far similar, and so far common to the trade, that it would be impossible to hold any one or more of them likely to deceive an ordinary

(1) 4 App. Cas. 479.

Appeal. 1907. HENNESSY v. KEATING. Fitz Gibbon, L.J.

customer, by resemblance in these respects alone, or to facilitate the passing off upon him of one maker's brandy instead of another's, unless he could hold the same of them all. Taking them in the order of "artistic merit," as it is called, or of the quantity of gilding upon them, and in the order of general resemblance taking the plaintiffs label as (i) the label which seems to me to be most like it is (ii) the "Camille Laporte" label. It scarcely differs from the plaintiffs label, except in bearing the name "Camille Laporte" instead of "Jas. Hennessy & Co.," and an amphora, described as a "trade mark," instead of the plaintiffs battle-axe. Following in order of resemblance, bearing no trade mark, and with the vine border gradually growing, we have (iii) "Marteleur Frères"; (iv) "Jules Chateau & Co.," stated in England to be a "fancy name"; (v) "Ehrmann & Co."; and (vi) "Boulestin & Co." All these labels contain "Cognac." Next comes (vii) the "Finest Old Brandy" label; then the two "Celebrated Old Brandy" labels, (viii) the defendant's; and (ix) the similar label produced to the witnesses, "No. 2" in the Schedule of Evidence, which, though not printed from the same stones, is practically identical with the impeached label. Lastly we have (x), the "Finest Old French Brandy" label, which is Hely's stock label, on sale by that important firm, and in use in Dublin for many years, and, except in its wording, closely resembling the two "Celebrated Old Brandy" labels.

With these labels before me, I refer to the only evidence in favour of the defendant to which the Master of the Rolls, in his judgment, attaches any importance. He says:—"The advertisements of the plaintiffs have given me more pause than any other circumstance in the case, because the plaintiffs have in those advertisements called attention to the matters which apparently they considered *the absolutely essential characteristics of their registered trade marks.*" I take these advertisements in the order of date. [His lordship read these advertisements, in which the plaintiffs gave a list of other labels, and referred to the distinguishing characteristics of their own labels, viz., the name "Jas. Hennessy & Co., Cognac," "the battle-axe device," the "sign of the stars," already referred to in the judgment of the Lord Chancellor, and informed purchasers how to ensure getting

"Hennessy."] All these features are absent from the label complained of.

I now come to a question, not considered by the Master of the Rolls, but which is in my opinion vital to the defendant's case—Was the "Celebrated Old Brandy" label, long before the defendant used it, common to the trade in Dublin; or did he fraudulently procure it for the purpose of passing off inferior brandy as Hennessy's? There is no evidence to contradict his swearing that the labels were not "contrived" by him, or even, in the first instance, used with his knowledge. We may disbelieve him; but positive evidence is given by his assistant Daly, that eleven and no more of these labels, were found in a drawer in the defendant's establishment at Store Street, having been left there by M'Cabe, the previous tenant. Before coming to this specific testimony, of which the Master of the Rolls says that he "did not believe one word," I must refer to the evidence of independent witnesses as to the previous use of both the "Celebrated Old Brandy" label and Hennessy's label in Dublin.

Mr. Campbell, for the plaintiffs, insisted that every witness who spoke of the "Celebrated Old Brandy" label was speaking of the defendant's label, *i.e.*, a label printed off the same stones, or at least procured from the same source. If this was so, it would rather help the defendant, by showing that the label was not only old, but in common use. But two "Celebrated Old Brandy" labels are in proof. One is on the bottle bought by the plaintiffs' agent from the defendant; the other, "No. 2," produced to the witnesses, certainly did not come from the same stones or source as the defendant's label; and the fair inference is that the witnesses were speaking of labels identical in lettering and general design with the defendant's label, which may or may not have come from different printers, but which must have been produced from at least two distinct sources.

O'Reilly, the present Chairman of the Vintners' Association, was familiar with both the "Celebrated Old Brandy" label and Hennessy's label for years; they were in common use; he used to get the "Celebrated Old Brandy" label years ago; he purchased it from Miller & Co.; he stocks no brandies but Hennessy's and Martell's in his present establishment, and has had no

Appeal. 1907. HENNESSY v. KEATING. Fitz Gibbon, L.J.

experience for the last ten years of this "Celebrated Old Brandy," but he sees the label in other establishments in the city now, and he knows it to be as frequently in use as Hennessy's label.

Gethings, last year's chairman of the Association, is quite familiar with both labels, but has not seen the "Celebrated Old Brandy" label for the last six years, though he had it himself up to that date. The vine leaf is in some cases the principal item of the labels, there are a great many brandy labels with gold upon white; the cheapest brandy he sells is "Camille Laporte," which he has sold for the last six years, during which he has not used the "Celebrated Old Brandy" label; and nobody in the world could mistake the "Camille Laporte Cognac" label for Hennessy's. Yet, in design and execution, these labels differ only in the names, and in an amphora as a trade mark instead of the battle-axe; and, of all the 10 labels in proof, the Camille Laporte label most nearly resembles the plaintiffs label.

John Davin, in business 30 years as a licensed grocer, would not say that the vine leaf upon brandy labels is common, but it is used upon other labels besides Hennessy's, there are very many labels of that description, and he has seen the "Celebrated Old Brandy" label.

Russell, manager of the Phœnix Brewery, with 15 to 20 years experience of the trade in shops like the defendant's, says that nearly all brandy labels and champagne labels have gold and white upon them, and vine leaves. The vine leaf is the recognized brandy label, no matter what colour it is. The name "Hennessy," and the battle-axe trade mark, are what he looks to when he is standing a drink of brandy, as he often does. Martell's is the only house that uses blue labels; and white on gold, with vine leaves, is a "stock label" for brandy.

Edward Hackett, with 16 years experience, is not very familiar with that very particular "Celebrated Old Brandy" label of the defendant; but he has seen a label practically similar to it in use in the trade, with a vine leaf in gold upon white.

Thomas O'Connor, with 15 to 20 years experience, representative of the well-known firm of Casson & Company, says that the publicans who deal in cheap brandy have to go to printers where stock labels are kept, such as Hely's or Shuley's or others,

to get labels for that brandy. He has seen vine leaves upon many labels, and gold upon white; and sees the "Celebrated Old Brandy" label in different houses in common use. The chief characteristic of Hennessy's label is the name and the trade mark. He thinks the "Celebrated Old Brandy" label is a matter of fancy with traders; it is a recognized thing with regard to brandy that it should have a vine leaf, and it is generally white and gold. The majority of labels for cheaper brandies that he has seen have vine leaves; and he ought to know all about it, because he acts for Camille Laporte, who, according to Mr. Gethings, are vendors of cheap brandy. Mr. O'Connor's evidence appears to supply an explanation of the defendant's action in buying the "Finest French Brandy" label after he had used up his eleven "Celebrated Labels," rather than use the Laporte label, namely, that dealers like to have a *descriptive* label for cheap brandy, rather than one which gives the name of the maker.

Peter Kelly regards the garland of vines as the chief thing common to both labels, and supposed to denote that brandy is distilled from the juice of the grape. That distinguishes it from whiskey. He has known Hennessy's label for years, and has seen the "Celebrated Old Brandy" label, but has not used it in his trade.

P. Ryan, to whom the "Celebrated Old Brandy" label, No. 2, was produced, considers it not an infringement, because it does not contain the word "Cognac." In his experience, a vine leaf is a common thing upon brandy labels; and he was acquainted with it, and used it himself, having got it from Mitchell & Co. Two or three years ago Hennessy threatened proceedings against him in connexion with it; but did not take them. He says he used what he had of them, and refused to pay expenses; but he wisely never used the label again after he had exhausted the eleven bottles he had, and on his undertaking to discontinue using it, the proceedings were abandoned. Probably Mr. Keating would have acted more wisely if he had done the same thing, rather than become a defendant in this action.

Peter Smith, for 30 years in business, also had No. 2 label produced to him; he had used that label on brandy for the last 15 or 16 years, and had seen the vine-leaf border on almost every

Appeal. 1907. HENNESSY v. KEATING. Fitz Gibbon, L.J.

brandy label in Dublin for nearly 30 years; such labels are stocked by wholesale printers, who can afford to sell them cheap.

Before referring to the evidence of the independent witnesses, Matthews and Lyons, which I consider to be most material on the charge of perjury, I refer to the evidence of the defendant and of his assistant, Daly. The defendant states that he began business in Store Street in 1897, and that the labels in question were put upon one octave of brandy, which he bought in December, 1905, from Delont Frères, of Cognac. He had no idea where he got the label; it was in the place before he came; his assistant put it on; he did not buy it from any person. There were a lot of things, including labels, left there by M'Cabe, the previous occupant, when he came to the house. For the 17 years that he has been in the trade Hennessy's label has been in existence and familiar to every person. He found a general parcel, with several bundles, when he went to Store Street in 1897, but he does not say that he saw these labels then. It was the assistant, and not he, that first found them. He never used this label until 1906, and he is not using it now. He could give no assistance to the Court as to where it came from.

Daly must be committing absolute perjury for no apparent motive, unless his account of the discovery of the "Celebrated Old Brandy" label is true. He had seen the labels for the first time in January, 1905, when he found them in a drawer where there were a lot of other labels; he saw them in the drawer, loose, when he was getting some others. Bottling Delont's brandy some short time after, he went to the drawer where he had seen them, and he himself put 11 of them on the bottles, not having had any conversation with the defendant on the subject. He dared say there were hundreds of labels in the drawer, scattered about, mixed up in every way. There were no other labels for brandy, except those he found, in the drawer; and he knew that what he was bottling was French brandy.

It is difficult to conceive a more trivial incident on which to found a suit of this description, and I am surprised that the judgment under appeal does not refer to the evidence, or even mention the names, of two independent witnesses, who prove

circumstances relating to the very labels in question which go far to corroborate the defendant and Daly.

Mr. John Matthews, the principal artist in Hely's, Limited, was produced to prove that the "Finest Old French Brandy" label, which the defendant got from his firm in August, 1906, after using up the "Celebrated Old Brandy" labels, and which, except in the wording, closely resembles the impeached label, was drawn before he went to Hely's, and was a "stock label" as long as he was working in the business—that is, for 26 years. In fact he said that there was a possibility that it was in existence before Hennessy's. As long as he knew it, for 26 years, that label had been a stock label supplied to men in the trade. He undoubtedly saw it; it was not specially designed for the defendant. There are plenty of them about; plenty in use. There is scarcely a printer in Ireland or England who has not heard of them. Similar labels have been in use in the city of Dublin for 26 years. The first, and most important, feature of Hennessy's label is the name and address; the second is the battle-axe. Neither is on the "Celebrated Old Brandy" label. The witness, as an expert, pointed out what he considered as absolute differences between the two labels. *On cross-examination*, it turned out that this witness, who had been for 28 or 30 years in the printing trade, had worked 15 or 16 years ago with the very firm who printed the defendant's "Celebrated Old Brandy" label, Messrs. Lyons & Son, of Ormond Quay. He swore positively to having seen that same label 26 years ago in general use; he remembered it ever since, because it had "passed through his hands."

Is it not a strong corroboration of the swearing of the defendant, and of Daly, that these labels were found in a house which first came into the defendant's possession in 1897, and of his belief that they were in the place before he came, that the *only copy* of the impeached label which the plaintiffs have put in evidence is on the bottle bought from the defendant on February 24, 1906, very shortly after Daly swears that he put it on; and that Matthews, an independent witness called for another purpose, proves, on cross-examination, that this very label was printed from stones that he worked for Lyons & Son, 15 or 16 years ago; and this corroboration is immensely strengthened by the evidence of

Appeal. 1907.

HENNESSY v. KEATIN

Fitz Gibbon, L.J.

the last witness for the defence, Joseph Lyons, who was the senior partner in the firm of Lyons & Son, who swore that he knows that label since 1879; that it was not an innovation then; that up to 1898 those labels were printed and known as the "Celebrated Old Brandy" labels; that in that year the company was wound up owing to a family dispute; and that this label was in use up till that year, and was recognized as a stock brandy label by nearly all the trade. He gave, as his means of knowledge, that he printed it himself, carried a sample book of labels with him, and got orders for that label from the trade according as they wanted it; in short, that the exact label for which this action is brought was a stock label sold by his own firm until 1898, when his business was wound up altogether, leaving no successor.

While this is a strong corroboration of the defendant's statement that the 11 labels which have got him into this litigation were the residue of an old stock found in the house in which he commenced business in 1897, when Lyons & Son were printing them, the fact that the "Celebrated Old Brandy" label, No. 2, which is almost a duplicate of the Lyons label, did not come off those stones, is equally strong evidence that "Celebrated Old Brandy" labels were printed and sold, then and since, by more firms than one, and were common to the trade.

Under such circumstances we cannot hold the plaintiffs exclusively entitled to anything in or about their label, except the features which they themselves have treated as essential: the name, "Jas. Hennessy & Co.," with the place of production, "Cognac"; and their registered trade mark, the arm and battle-axe. Unlesss these are colourably imitated—which they are not—or the label is so contrived as to be likely to deceive notwithstanding their omission, the plaintiffs have failed to prove their cause of action.

A colourable imitation might deceive, even though it did not contain the essential features of the original; but I have asked during the argument, and I have since endeavoured to imagine, how the apprehended deceit could be effected with the label impeached here, having regard to the fact that there are so many other labels now in the trade, all of which have the same features of resemblance to the plaintiffs label, though they all omit the

name, address, and trade mark. To sustain the action, it must be likely that inferior brandy will be passed off for Hennessy's, by means of the resemblance between the labels. If a whole bottle is asked for, it is inconsistent with what Lord Macnaghten calls "treating the label fairly," that a man should ask for Hennessy's Cognac—say "Hennessy, Please!" in the words of the advertisement—and take a bottle labelled conspicuously "Celebrated Old Brandy," or "Finest Old French Brandy," or "Camille Laporte, Cognac," in the belief that he was getting Hennessy's. We may assume that the plaintiffs agent, when spending five shillings on the bottle produced, did nothing to prevent the vendor from trying to pass it off as Hennessy's brandy; but nothing of the kind happened; the defendant asked only five shillings, and he gave a receipt for it, as the price of the cheap bottle of "Celebrated Brandy."

It would have been endless to quote the evidence of all the witnesses, including Mr. Sandeman himself, as to the difficulty of passing off inferior brandy as Hennessy's, by means of any label which gave no maker's name, did not mention Cognac, and declared the contents to be "Celebrated Old Brandy." As to sales from the bottle, the evidence of the circumstances under which "eightpenny brandy" such as Hennessy's, or "sixpenny brandy" such as the "Celebrated Old Brandy" brand, are demanded, sold, and drunk by the glass, are repeated *ad nauseam* in the evidence. It is admitted that no single instance of actual mistake or deceit can be proved. The common use of similar labels for so many varieties of cheap brandy negatives the conclusion that this was a deliberate fraud practised by the defendant alone, as the one dishonest member of the licensed trade in Dublin, of whom the Master of the Rolls says that the trade as a body require no certificate from him—a statement strangely inconsistent with Mr. Campbell's statement that this action was brought "to put an end to the scandalous attempts at fraud and deception prevalent in Dublin." He asked how many of the features of the defendant's label were copied from the plaintiffs registered trade mark label, and answered: "All but the name and battle-axe." But if that gave the plaintiffs a cause of action, it must follow that every firm that has used its own name on a white and gold label of similar

Appeal. 1907.

HENNESSY v. KEATING.

Fitz Gibbon, L.J.

size and shape, with a vine-leaf border, a double stem and wreath, a true lovers knot, and a gold band, in selling brandy, must have been equally fraudulent with the defendant, and equally liable to an injunction; all the labels before us are "calculated to deceive" if the defendant's label is so.

Such a conclusion would, in my opinion, be contrary to the evidence to which I have felt it my duty to refer in detail; and, I therefore concur in the judgment of the Lord Chancellor.

HOLMES, L.J.:—

The cause of action set forth in the statement of claim is that the defendant is selling and offering for sale brandy, not manufactured by the plaintiffs, contained in bottles bearing body-labels which are colourable imitations of the plaintiffs' registered trade mark label, and therefore calculated to mislead purchasers and others into the belief that the brandy so offered for sale is manufactured, imported, or bottled by the plaintiffs' firm.

The evidence given on the part of the plaintiffs to sustain the action was rather meagre. It was proved that the plaintiffs manufacture brandy in Cognac, that they import into the United Kingdom large quantities in bottles contained in cases and that each bottle has on it a large label registered as a trade mark for the first time in 1876, and re-registered since at the legal intervals. It was also proved that an inspector of the plaintiffs on the 24th February, 1906, bought in the defendant's publichouse a bottle of brandy with a label on it, and that this brandy on analysis was of inferior quality to any brandy manufactured by the plaintiffs. It is the use of this last-mentioned label that is complained of in the action; and of course it was produced to the Court for comparison with the trade mark label. Counsel for the plaintiffs closed their case without offering any further evidence; but the witnesses called by them gave on cross-examination some answers relied on by the defendant to which I shall presently refer. Before doing so, however, a brief description of the two labels is needed to explain the real matter in controversy. The label registered by the plaintiffs is of the size and shape commonly used on brandy and whiskey bottles, white in colour and with a gold border of vine leaves and grapes in the form of a garland tied at the base with ribbon, and

surmounted by a mailed arm and hand grasping a battle-axe. In the centre of this border there is printed in large gold letters "Jas. Hennessy & Co., Cognac," and under the border there are in black letters the words "Registered at Stationers' Hall." The label complained of is also white and of about the same size and shape as the other. It, too, has a golden border of vine leaves and grapes resembling generally but not in detail that on the plaintiffs' label; but there is no mailed arm, hand, or battle-axe, and there is printed within the border "Celebrated Old Brandy"; nor do the words "Registered at Stationers' Hall" appear. These being the characteristic features of the two labels, I turn to the evidence on cross-examination of the plaintiffs' witnesses.

Mr. Sandeman, the managing director of the Company that have for many years acted as the plaintiffs' agents, was asked what were the objectionable features on the label complained of. To my astonishment he was not allowed to answer this reasonable question; but, upon being referred to an advertisement in the *Irish Field* of the 10th November, 1906, he said that it had been published, as well as other advertisements read by the Lord Chancellor, by the plaintiffs from time to time. This advertisement purports to be a caution to the public against fraudulent imitations of their trade mark, and describes how their genuine brandy can be known.

In addition to labels it refers to the corks and capsules of the bottles, to which great importance is attached, but which it is not suggested were copied on the defendant's bottle in any way.

It then gives the characteristic features of the label; and, taking those that are distinguished by large print, they are represented as consisting of—(1) the name in the middle of the label, "Jas. Hennessy & Co., Cognac"; (2) a battle-axe; and (3) in small black print "Registered at Stationers' Hall." None of these features appear in the label complained of. This witness further admits that he has seen very often the use of white and gold in brandy labels, but that he would not go so far as to say that it was very common; and he adds that he knew no case of anyone that was deceived by the impeached label. The inspector, on cross-examination, stated that if he wanted to ensure getting a bottle of Hennessy's brandy he would expect to see on it a neck label with stars. This refers to the one star, two stars, or three

Appeal. 1907.

HENNESSY v. KEATING.

Holmes, L.J.

stars, which, it is admitted, have for some time been shown on the neck of Hennessy's bottles, but which are not claimed by them as a trade mark. It is argued with some force that if there were placed on the bottle a label with the intention to deceive, the star or stars would also be shown upon its neck.

There is no doubt that the plaintiffs' evidence when it closed left the issue to depend on the eyesight of the judge; and it is contended by Mr. Ronan that a case of this kind ought not to be decided on this evidence alone. It is not denied that the Court may judge for itself where the trade mark and the alleged imitation are practically identical; but it is argued that it ought not to do so where there are substantial differences. I am not prepared to lay this down as a proposition of law. I confess that I should myself prefer to have the views of independent witnesses; but if a judge has perfect confidence in the result of his own observation, he is, I think, in such a case as the present, at liberty to act on it. Moreover, the defendant himself and many other persons on his behalf having been examined, the Judge was undoubtedly entitled to look at all the evidence, and to supplement the plaintiffs' case by what has been proved or admitted by the other side. There is, however, no doubt that the real foundation of the judgment of the Master of the Rolls is his own examination and comparison of the two labels. "From the moment," he says, "that the plaintiffs' registered trade mark was handed up to me and compared by me with the label used by the defendant, I have never entertained a doubt that the man who designed the 'Celebrated Old Brandy' label designed it for the purpose of imitating the plaintiffs' label." In addition to this he was to some extent influenced by portions of the defendant's evidence as to which I am disposed to take a somewhat different view. The defendant was what advocates call "a bad witness," by which they do not mean a witness deliberately untruthful, but one whose mode of giving evidence creates an unfavourable impression. It is easy to find throughout his long cross-examination, blunders, inconsistencies, and contradictions; but I am bound to say that there are few men who would not have been confused by the spirit of acerbity and insult with which the examination was conducted.

The first point that seemed to strike the Judge was the statement of the witness, persisted in from first to last, that he did not know where the labels used by him came from. He says that he took over the business in 1897, from another publican, who left behind him many labels for wine, whiskey, and brandy bottles; and that he believes that the label complained of was one of these. Now there is nothing improbable in this. It was proved that the "Celebrated Old Brandy" label was a stock label, printed and sold by a well-known Dublin firm during at least the twenty years preceding 1898. The quantity of brandy bought in cask and bottled by a publican in the defendant's position would, according to the evidence, be small; and comparatively few labels would be required. If his predecessor had left a quantity of labels behind him, it is not unlikely that some of them were still in the place in 1905. The Master of the Rolls evidently did not believe that the defendant was unable to tell where the labels came from.

I am of a different opinion, for the simple reason that it is one of the first questions that his legal advisers would have asked him, and they would have given him to understand that it was most important in his own interest to answer it. The stones from which the label was printed were certainly not made for the defendant. It was evidently a stock label of some printer, and the evidence of such printer, like that of the other lithographers produced, would have helped the defendant's case. My opinion is that the printers were Lyons & Co., for the reasons given by Lord Justice FitzGibbon, and they wound up their business in 1898. Another point dwelt on by the Master of the Rolls is that the defendant having written in March that he had no objection to giving up the label, as he had only a few in stock, and as the Cognac firm from which he bought would supply their labels free, and having afterwards got some of these free labels, did not use them, but purchased from Hely's, Limited, five hundred of their stock-labels. I doubt if in doing this he was thinking at all of Hennessy's labels. The probable cause was that he saw that the labels of Delout Frères were wholly different from any labels used for low-priced brandy in Dublin, and he wanted something like what were generally employed in the trade. I fail to understand why the

Appeal. 1907.

HENNESSY v. KEATING.

Holmes, L.J.

exhibition in the defendant's shop of the large picture of their trade marks supplied by the plaintiffs to their customers was regarded with suspicion by the Master of the Rolls. There is no doubt that he had bottles of Hennessy's brandy in stock, and that any person wanting one of them could see at a glance whether its label corresponded with that delineated in the picture. I cannot understand why, if the publicans of Dublin bear, as I believe they do, the high character which the Master of the Rolls endorsed, the defendant should be denounced as an exceptional sinner for using a label which it is proved is common in the trade.

I now turn from matters that are comparatively unimportant to the real issue. In considering whether the label complained of is calculated to mislead or deceive, we must have some definite notion of the class of persons who might be deceived by it. It is clear from the evidence—and, indeed, a native of this country hardly requires evidence of it—that very little brandy is drunk at the counters of Dublin publichouses. Stout and whiskey are the drinks of the country, and for a customer to ask for a glass of brandy is exceptional. I gather from the cross-examination of the defendant's witnesses that the persons whom the plaintiffs allege may be deceived by this label belong to this small class. It has not been argued, and I do not think it could be argued, that men and women who buy brandy by the bottle for consumption at home would be thus misled. If these people had any knowledge of the plaintiffs' label, they would see when the bottle was delivered that the "Celebrated Old Brandy" label was not Hennessy's, and if they wanted Hennessy's brandy, they would send it back. The person whom it is suggested was likely to be deceived was the customer standing at the bar who has a glance at the label of the bottle as his glass is being filled, and who is led by this glance to believe that he is getting the plaintiffs' brandy. But it must be remembered that no deception can be caused in this way if the customer has no previous knowledge of Hennessy's trade mark, or if he does not care whether he gets their brandy or not. According to the evidence a person ordering brandy in a publichouse either is about to take it as a kind of medicine, or does so because he prefers brandy to whiskey; and in the former case he is careful to see that he gets the kind of brandy he wants, and in the latter

he is thinking of price not quality. There may, however, be amongst the frequenters of publichouses some men and women who like the plaintiffs' brandy, and who have a general acquaintance with their trade-mark label, and who may be led into the belief that they are getting the liquor they want by a label bearing a resemblance to it on the bottle from which the barman pours the drink. But is the label complained of such a label? Does it bear such a resemblance to the other as would be calculated to mislead even the most careless and casual person?

This case is an instance of the different—nay, opposite conclusions—that may be come to by two minds as the result of the personal inspection of designs impressed on two pieces of paper. I have already stated the view of the Master of the Rolls. I, on the other hand, am not only unable to see the great resemblance observed by him, but I think the points of resemblance are very trifling. The label is of the usual shape and size, and equally usual is the gold on a white ground. Mr. Sandeman, the plaintiffs' agent, says in words already quoted: "I have seen the white and gold in brandy labels very often." These things are therefore purely neutral. The points emphasized in the plaintiffs' advertisements, "Hennessy & Co., Cognac," the battle-axe held by a mailed hand and arm, and the words in small black print, "Registered at Stationers' Hall," do not appear at all; and the description, "Celebrated Old Brandy," is unlike anything in the trade-mark label. The only thing remaining is the border of grapes and vine-leaves. The two borders taken by themselves resemble each other, but they are not identical; and as for the ribbon at the base, its importance may be measured by the evident sincerity with which a witness with long experience in the trade declared that he had never noticed it till his attention was called to it in Court. The border is therefore the only material matter; and as brandy is supposed to be distilled from the juice of the grape, vine-leaves and bunches of the fruit would be a very natural decoration on a brandy label. There is, moreover, abundant evidence to show that they are in very general use in the trade. Joseph Lyons, formerly a senior member of a printing establishment in Dublin, said that during the time he was a member of the firm—that is to say, from 1879 to 1898—they

Appeal. 1907. HENNESSY v. KEATING. Holmes, L.J.

printed and sold the "Celebrated Old Brandy" label, and that it was recognized as a stock label by nearly all the trade. He is also able to say that it was not an innovation in 1879, and that the cause of its ceasing to be printed in 1898 was that the company, which had been successful, was then wound up owing to a family dispute. John Matthews, the chief artist in Hely's, Limited, probably the largest printing establishment in Dublin, proved that the label produced, similar to those purchased by the defendant to which I have already referred, was drawn in stone before he went to Hely's, and had been a stock label to his knowledge for twenty-six years, and probably for much longer. This label has a gold border of grapes and vine-leaves, and there is abundance of evidence that labels with the same kind of border have been in general use. Several bottles produced at the trial with labels of different kinds, and with the names on them of different manufacturers, but all having a border of grapes and vine-leaves, were on the table before us; and I am satisfied that from the time labels came into use this was a usual feature of brandy labels. For this reason I hold that the adoption of it in the label complained of was not an infringement of the plaintiffs' trade mark. Furthermore I hold that apart from the usage of the trade, the label complained of is in its essential characteristics so different from that registered by the plaintiffs as that it is not calculated to deceive or to mislead.

I have come to this conclusion, not merely as the result of examination with my own eyes, but also as being the conclusion that would be come to by what I may call the average man, who, having a general knowledge of the plaintiffs' label, sees the other for the first time.

For these reasons I concur in allowing the appeal. Before parting from the case I desire to refer to one thing which seemed to impress the Master of the Rolls. There was evidence that publicans using a label on brandy similar to or resembling that complained of, on being challenged by the plaintiffs, abandoned its use. The proof of this was weak; but I have no doubt many instances of this kind could be given, and I confess that I am somewhat surprised that the defendant did not act in this way. The matter in dispute is of no real importance to either side. If

the defendant or any other Dublin publican were for the future to use no label on bottles of cheap brandy, he would not lose a shilling by it. Nor if all Dublin publicans did so, would the plaintiffs derive any advantage. At present people in Ireland who desire Hennessy's brandy, and are willing to pay for it, get it; and it is only to persons who want a different or a cheaper brandy that other brandy is sold. Therefore a publican challenged by a person in the position of the plaintiffs about a label would prefer as a rule to give up the use of it, rather than be made a defendant in an action. He knows that a staff of inspectors and solicitors must justify their existence; that the cost of a lawsuit, which is really a valuable advertisement to a rich firm like the plaintiffs, will probably bring ruin to him; and that his best course is to agree with his adversary quickly. I cannot tell why the defendant did not so act. He may be stupid and obstinate; or he may be a publican of an independent type who does not like to be bullied out of what he considers to be his legal rights. The public have, both before and since the days of Hampden, sometimes gained by a battle fought by such a man; but, whatever the result may be, the conflict is almost certain to be fatal to his private interests. This will probably be the case, whatever may be the end of this present litigation. Our decision, however, cannot be influenced by the wisdom or folly of his action, but solely by the facts proved in evidence or observed by our own eyes, and the legal considerations that apply thereto.

Solicitors for the plaintiffs: *A. D. Kennedy & Figgis.*
Solicitor for the defendant: *C. O'Rorke.*

R. ST. J. C.

Appeal.
1907.

Dec. 9, 16.

KNIPE *v.* RIDDALL (1).

Landlord and tenant—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 20—*Sale of present tenancy in consequence of a breach of a statutory condition—Bankruptcy of tenant—Sale in bankruptcy—Right of purchaser to apply to fix a fair rent for the second term.*

S., a tenant of a farm in the county of Armagh, had a fair rent fixed for the first term in July, 1891. On the 17th September, 1895, S. was adjudicated bankrupt on his own petition. K. purchased the farm in the bankruptcy of S., and the sale was confirmed by the Court. In 1906 K. applied to fix a fair rent for the second term:—

Held (affirming the decision of FitzGerald, J.), that this was not a sale of a present tenancy, in consequence of a breach of a statutory condition within the meaning of section 20 of the Land Law (Ireland) Act, 1881, and that the tenant was entitled to have a fair rent fixed for the second term (2).

THE holding in this case consisted of about 100 acres in the County of Armagh, and was let originally by John Scott to Henry Scott in 1863. In July, 1891, the fair rent was fixed for

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) Land Law (Ireland) Act, 1881, sect. 1, sub-sect. 7:—"Where the tenancy is subject to any such conditions as are in this Act declared to be statutory conditions, and the sale is made in consequence of proceedings by the landlord for the purpose of recovering possession of the holding by reason of the breach of any of such conditions, the Court shall grant to the landlord out of the purchase-moneys payment of any debt, including arrears of rent, due to him by the tenant, and compensation by way of damages for any injury he may have sustained from the tenant by breach of any such conditions, except the condition relating to the payment of rent.

Sect. 13, sub-sect. 1:—"Where proceedings are or have been taken by the landlord to compel a tenant to quit his holding, the tenant may sell his tenancy at any time before but not after the expiration of six months from the execution of a writ or decree for possession in an ejectment for non-payment of rent, and at any time before but not after the execution of such writ or decree in any ejectment other than for non-payment of rent; and any such tenancy so sold shall be and be deemed to be a subsisting tenancy notwithstanding such proceedings, without prejudice to the landlord's rights, in the event of the said tenancy not being redeemed within said period of six months; and, if any

the first time by the Land Commission at £163. On the 17th September, 1905, the tenant was adjudicated bankrupt on his own petition. On the 10th January, 1896, an order for sale of the farm was made in the bankruptcy. On the 20th February, 1896, the farm was sold, together with two small holdings of 10 and 7 acres respectively, to the present tenant, Knipe, for £1720. The sale was confirmed by the Court of Bankruptcy on the 21st February, 1896, and on the 10th March, 1896, the holding, together with

judgment or decree in ejectment has been obtained before the passing of this Act, such tenant may, within the same periods respectively, apply to the Court to fix the judicial rent of the holding, but subject to the provisions herein contained such application shall not invalidate or prejudice any such judgment or decree, which shall remain in full force and effect."

Sect. 13, sub-sect. 3 :—" Where any proceedings for compelling the tenant of a present tenancy to quit his holding shall have been taken before or after an application to fix a judicial rent, and shall be pending before such application is disposed of, the Court before which such proceedings are pending shall have power, on such terms and conditions as the Court may direct, to postpone or suspend such proceedings until the termination of the proceedings on the application for such judicial rent; and the pendency of any such proceedings for compelling the tenant to quit his holding shall not interfere with the power of the Court to fix such rent, or with any right of the tenant resulting from the rent being so fixed; and in such case any order made by the Court for fixing the rent shall operate in the same manner as if such order had been made on the day of the date of application. Provided that proceedings shall not be taken by a landlord to compel a tenant to quit his holding for breach of any statutory condition, save as follows :—(*a*) Where the condition broken is a condition relating to payment of rent, then by ejectment subject to the provisions of the statutes relating to ejectment for non-payment of rent; and (*b*) Where the condition broken is any other statutory condition, then by ejectment founded on notice to quit."

Sect. 20 (last clause) :—" Whenever a present tenancy is sold in consequence of a breach by the tenant, after the passing of this Act, of a statutory condition, or, in the case of a tenancy not subject to statutory conditions, of an act or default on the part of a tenant, after the passing of this Act, which would, in a tenancy subject to such conditions, have constituted a breach thereof, the purchaser or his successors in title in such tenancy shall not at any time thereafter be entitled to apply to the Court under this Act to fix a judicial rent for the holding; but this provision shall not prejudice or affect the right of such purchaser or his successors to hold at such judicial rent during the residue of such statutory term, if any, as the holding may then be subject to, under the provisions of this Act."

Appeal. 1907.

KNIPE v. RIDDALL.

the two small holdings, was conveyed to Knipe. In 1906 Knipe applied to fix a fair rent for the second statutory term, and the Sub-Commission fixed a fair rent. The landlord appealed to the Land Commission, and on the 13th July, 1907, Judge FitzGerald affirmed the decision of the Sub-Commission. The landlord appealed.

D. S. Henry, K.C., and *Calvert*, for the appellant.

The Right Hon. J. H. Campbell, K.C., and *R. Best*, for the respondent.

The following cases were referred to:—*Reddy* v. *Elliott* (1), and *Ferguson* v. *Gosford* (2).

Dec. 16.

THE LORD CHANCELLOR:—

In this case, which is an appeal from a decision of Judge FitzGerald, the facts are not in dispute. There had been a yearly tenancy subject to a judicial rent fixed for the first term in July, 1891. The tenant became bankrupt on his own petition in 1895. The assignees elected to take the tenancy in 1896, and they sold in bankruptcy, with the consent of the incumbrancers, to the present tenant, Knipe. Knipe applied to fix a second term rent, and the landlord, at the hearing before Judge FitzGerald, raised the question that the tenant was not entitled to fix a second term rent, because the 20th section of the Act of 1881 applied to the case, and that not only the assignees who sold, but the purchaser from them, were only entitled to hold on during the residue of the first statutory term.

The question depends on the construction of the last clause of sect. 20 of the Act of 1881, which I shall read later on. In order to construe it, we must see what under the Act the position of a statutory tenant is. He is, under sect. 5, subject to six statutory conditions. The first is, that he shall pay rent at the appointed time; and the fourth is that he shall not do any act whereby his tenancy becomes vested in an assignee in bankruptcy. I need not mention the four others, save that for the purpose of

(1) 30 L. R. Ir. 653. (2) 4 Greer's Land Cases, 38.

illustrating the section, I may say that they include the commission of waste, and sub-dividing or subletting. The tenant is not to be compelled to quit his holding during the statutory term, except for the breach of a statutory condition, which in the case of his not paying the rent is to be enforced by ejectment for non-payment of rent, and in the case of other statutory conditions by ejectment founded upon a notice to quit. These two last provisions are contained in sect. 13, which section imposes restrictions upon the operation of a notice to quit, and proceedings taken by the landlord to compel a tenant to quit his holding, and accordingly it provides by sub-sect. 1. [His Lordship read the subsection, *ante*, p. 104.]

Thus it provides for a power to sell the tenancy, and that any such tenancy so sold shall be deemed to be a subsisting tenancy. If a tenant is compelled to quit his holding during the continuance of a statutory term in consequence of the breach of any statutory condition, sub-sect 6 enacts that he shall not be entitled to compensation for disturbance. The words there are "in consequence of," and the connexion is apparent. This is a penalty imposed in respect of the actual compulsory quitting by his fault. Sect. 20 is the complement of sect. 13, and fixes a period, in ease of the tenant, when, and not until, a tenancy to which the Act applies shall be deemed to have been determined. Sub-sect. 3 qualifies the rights of the landlord who, under the right of pre-emption given him by sect. 1, buys the tenancy; and sub-sect. 4 puts a tenant holding under the Ulster Custom in a better position than an ordinary tenant, "notwithstanding any *determination of his tenancy* by breach of a statutory condition or of an act or default of the same character as the breach of a statutory condition," again showing its close connexion. Those provisions aptly bring in, in connexion with them, sub-sect. 7 of sect. 1. [His Lordship read the subsection, *ante*, p. 104.]

The words there are "sale is made in consequence of proceedings by the landlord for the purpose of recovering possession," &c. This brings in precisely sect. 13. Now take up the last clause of sect. 20, on which immediately this case depends. [His Lordship read the clause, *ante*, p. 105.]

The words "in consequence of" must receive the same con-

Appeal. 1907.

KNIPE v. RIDDALL.

The Lord Chancellor.

struction all through in the case of every statutory condition, except that we must read in "in consequence of proceedings by the landlord for the purpose of recovering possession by reason of the breach of a statutory condition." That has not occurred; on the contrary, the assignees who took by operation of law have remained in possession by virtue of their ownership. They might, if they chose, having elected to take, be in possession still; and by virtue of that ownership they have sold.

We are not dealing with a case where the assignees have applied to fix a fair rent, but with their purchaser. The case of *Reddy* v. *Elliott* (1) is a decision really upon the point. The landlord recovered judgment for rent, and the sheriff sold the tenancy under a *fi. fa.* It was held that this was not a sale "in consequence of a breach of a statutory condition" within the meaning of sect. 20, and that the purchaser was entitled to apply to fix a fair rent. The sale pointed to is a sale forced upon the tenant by the provisions of sect. 13, if he wishes not altogether to lose his interest. We are not bound by that decision, but I think it is right. *Ferguson* v. *Gosford* (2) in this Court illustrates, and I think adopts, the view of the section which I take. There the tenant owed two years' rent under a judicial tenancy. The landlord obtained an ejectment decree which he did not press to an execution. Another year's rent accrued, and the tenant, with the approval of the landlord's agent, sold the tenancy to a purchaser who was accepted as tenant. The purchaser was held entitled to have a fair rent fixed. I shall read a passage from Lord Justice FitzGibbon's judgment which shows how he applied the words "sold in consequence of."

> "The landlord's contention necessarily goes the length of calling upon us to decide that if in any cases there has been a breach of a statutory condition by a tenant, followed by a proceeding upon such breach by the landlord, it is, if not the necessary, at least the almost irresistible, inference from the fact that the tenancy has been subsequently sold, that the sale was "in consequence of the breach of a statutory condition" within the meaning of sect. 20; consequently, pushed to its logical conclusion, the contention is, that if a tenant has once broken a statutory condition—even to the extent of being in

(1) 30 L. R. Ir. 653. (2) 4 Greer's Land Cases, 38.

arrear of his rent for a day, and if the landlord has taken any proceeding whatever against him in respect of the breach, the tenant can by no means whatever escape from the provisions of ss. 13 and 20 of the Act of 1881, and is no longer capable of selling the tenancy, with the right to fix a fair rent attached to it. This position appears to me entirely unsustainable."

There the tenant himself sold, which more nearly attracts the Act. This decision shows it is not enough to say—Oh, the sale would never have taken place if there had not been a breach of the statutory condition. We must see—Did the tenant sell? Well, he not only did not sell, but he clearly did not sell under sect. 13. The landlord never compelled him to resort to it by bringing an ejectment. He allowed the tenancy to pass by operation of law to the assignees, and they under their transmitted title sold by virtue of their ownership and duty. In my opinion, the case does not come within sect. 20, and the decision of Judge FitzGerald must be affirmed, and the appeal dismissed.

FITZGIBBON, L.J.:—

I concur, basing my judgment on the same reasoning on which *Reddy* v. *Elliott* (1) and *Ferguson* v. *Gosford* (2) were decided. In my opinion, this was not a sale in consequence of a breach of a statutory condition within the meaning of sect. 20 of the Act of 1881. It was really a sale in consequence of the tenant's bankruptcy: that was both the *causa sine quâ non* and also the *causa causans*. There may be some difficulty in the case of a tenancy not subject to statutory conditions: the clause as to that is, perhaps, puzzling, but we have not to deal with that now.

HOLMES, L.J.:—

A first term rent of a holding having been fixed by the Land Commission in 1891, the tenant in 1895 was adjudicated a bankrupt on his own petition, whereupon the assignees elected to take the term, and the holding was sold by order of the Court. The landlord did not interfere in the sale, and appears to have been paid the arrears of rent then due out of the purchase-money.

(1) 30 L. R. 653. (2) 4 Greer's Land Cases, 38.

Appeal. 1907.

KNIPE v. RIDDALL.

Holmes, L.J.

The question now before us arose upon an application to fix a second term rent, which is resisted by the landlord on the ground that the final clause of the 20th section of the Land Law (Ireland) Act, 1881, deprives the tenant of the right to apply. This clause provides in effect that, whenever a present tenancy is sold in consequence of a breach by the tenant of a statutory condition, the purchaser, although entitled to hold at the judicial rent during the residue of the judicial term current at the time of the sale, shall not be entitled at any time thereafter to apply to the Court to fix a further judicial rent. There are six statutory conditions imposed by sect. 5, sub-sect. 14, of the Act of 1881 on the tenant who has a fair rent fixed. I leave out of consideration the first, which relates to non-payment of rent; and the following observations refer only to the five others, one of which is, that the tenant shall not do any act whereby his tenancy becomes vested in an assignee in bankruptcy; and it is argued that the sale in this case was in consequence of a breach by the tenant of this statutory condition. If this be so, the consequence stated in the clause to which I have referred follows; and the application to fix a second term rent ought to be dismissed. The point of the case then is whether the sale under the order of the Court of Bankruptcy was a sale in consequence of a breach by the tenant of a statutory condition within the meaning of the clause. To answer this question I must read sect. 20 in connexion with sect. 13, which enacts in its 5th sub-section that proceedings shall not be taken by a landlord to compel a tenant to quit his holding for breach of a statutory condition other than a condition relating to the payment of rent save by ejectment founded on a notice to quit. The first clause of sect. 13 provides that where proceedings have been taken by a landlord to compel a tenant to quit his holding, the tenant may sell his tenancy at any time before but not after the execution of a writ or decree for possession in an ejectment other than for non-payment of rent. Now it is, I think, admitted that in the case of four out of the five conditions with which I am dealing, the sale referred to in the final clause of sect. 20 is a sale brought about by the landlord's service of a notice to quit as provided in sect. 13; but it is sought to distinguish the bankruptcy condition from the others on the ground that in them the tenancy

remains in the person who has broken the condition, while in bankruptcy it is the transfer of the tenancy to the assignees that constitutes the breach. I am unable to see how this distinction can affect the construction of sect. 20. If in the case of the other conditions, the sale in consequence of a breach by the tenant of a statutory condition means a sale brought about by the action of the landlord, there is no reason for not interpreting in the same way a sale in consequence of the breach of the condition relating to bankruptcy. The landlord may serve a notice to quit on the assignees and thereby force a sale. I therefore hold that the appeal ought to be dismissed.

Appeal. 1907. KNIPE v. RIDDALL. Holmes, L.J.

Solicitors for the landlord: *Best & Best.*
Solicitors for the tenant: *J. E. Peel & Son.*

R. D. M.

IN THE MATTER OF THE ESTATE OF WM. T. J. GUN.

Wylie, J. 1907. June 7, 10. — *Appeal.* Dec. 9, 10.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *section* 6—*Estimating price of estate—"Have regard to" prices at which tenants have undertaken to purchase where within zone limits—Conditional offer to purchase.*

Where, in proceedings for the sale of an estate under the provisions of section 6 of the Irish Land Act, 1903, an originating request had been lodged, together with undertakings by the tenants to purchase at prices which were within the zone limits:—

Held, that the Estates Commissioners, in estimating the price to be offered for the estate, while bound to have regard to the prices mentioned in the undertakings as evidence of what the tenants were willing to agree to give, were not necessarily bound to adopt them.

QUESTIONS OF LAW submitted by the Estates Commissioners to the Judicial Commissioner for his decision, pursuant to section 23, sub-sect. 1, of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—The vendor was absolute owner of the estate, and had applied to the Land Commission to purchase the

Wylie, J. 1907.

In re Gun's Estate.

same under the provisions of section 6 of the said Land Act, 1903. The property offered for sale consisted of the townland of Sleveen, in the barony of Clanmaurice and county of Kerry, containing 278A. 1R. 7P. (statute), held in fee-simple, and was in the occupation of seven tenants. Of these, six held subject to judicial rents, amounting in the whole to £119 15*s.*, fixed or agreed to since the passing of the Land Law (Ireland) Act, 1896, and one held under a non-judicial tenancy from year to year at the annual rent of £2. The said townland was bounded on the south by the river Brick; and in order to protect the more low-lying portions of the townland from inundation, a river embankment had some years previously been put up, and had since been maintained by the vendor and his predecessor in title. This embankment also protected portion of the vendor's demesne lands which he did not purpose to sell under the Act. The tenants had entered into a deed of covenant to maintain so much of the embankment as was situated on their holdings respectively. This deed was signed by all the tenants save one. It was agreed between the vendor and the tenants that, having regard to this obligation, the prices of their holdings should be such as comparing purchase annuities with rents would give them a reduction on rents of 5 per cent. more than had been allowed to the tenants on other portions of the vendor's estate which had already been sold. Accordingly, all the tenants, with the exception of one, signed undertakings, in Form "P," to purchase their holdings at the sums set out opposite their names in the second column of the schedule to the memorandum, which sums amounted in the aggregate to £2418. The purchase annuities on the prices mentioned in the undertakings would, in the case of the judicial holdings, have been within the provisions of section 1, sub-sect. 1, of the Irish Land Act, 1903. The said agreement as to the maintenance of the embankment, and the prices mentioned in the undertakings, had, however, been arranged without the sanction or authority of the Estates Commissioners, and before the Estates Commissioners had made any offer for the estate. Inquiries pursuant to section 6 were duly made; and on the 18th October, 1906, the Estates Commissioners having considered the report of their inspector and the circumstances of the case, made an offer to purchase the estate. The

estimated prices for the several holdings, the aggregate of which made up the sum offered by the Estates Commissioners for the estate, were, save in one case, less than the prices in the undertakings lodged by the vendor, and were, in fact, such that the purchase annuities would have been in every case, with the one exception, more than 30 per cent. less than the existing rents. The offer also contained a condition with reference to the embankment, that the vendor should, prior to the agreement for purchase, effect certain specified repairs and improvements thereon. The vendor objected to the price offered by the Estates Commissioners for the estate, and to the condition as to the embankment contained in the offer. At his request the following questions were submitted :—

(1) Whether the price to be offered for the estate pursuant to section 6 of the Irish Land Act, 1903, must be estimated upon the basis of the sums opposite to the tenants' names in the second column of the schedule to the memorandum, such sums being within the zones, and being sums at which, prior to the lodgment of the originating request, the tenants gave to the vendor undertakings to purchase from the Land Commission; or might the price to be offered be based on the prices estimated by the Commissioners, though differing from the prices at which the tenants gave undertakings to the owner to purchase before the originating request was lodged?

(2) Whether the Estates Commissioners in estimating such price as aforesaid must base the same upon such purchase-money that the annuities thereon would be within the provisions of section 1, sub-sect. 1, of the Irish Land Act, 1903? and

(3) Were the Estates Commissioners entitled to make the condition as to repairs of the river embankment in the proposal, in manner and form as appeared therein, or with a limitation as to amount of expenditure, or in any other form? or were they bound to make an offer for the estate in its present condition?

W. M. Jellett, K.C., and *E. J. Little*, for the vendor :—

The provisions of sect. 1 apply in the case of sales to the Land Commission. The opening words of the section are—"In the case of the sale of an estate, whether to the Land Commission

Wylie, J. 1907. *In re* Gun's Estate.

or otherwise." So far as the landlord and tenant are concerned the prices are fixed by the undertakings. The only thing the Land Commission have to satisfy themselves as to is that the resale of the estate can be effected without prospect of loss. Our contention is that when the prices agreed upon between landlord and tenant are zone prices, the Land Commission cannot fix any other prices. Sections 6 and 7 merely provide special machinery for carrying out the same object as the earlier sections have in view, namely the transfer of the fee-simple to the tenants. Section 6 provides that, in estimating the price to be offered for the estate, the Commissioners are to have regard to the foregoing provisions of the Act in respect of advances, and to the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate. If the Estates Commissioners change zone prices into non-zone prices, they are merely having regard to the prices mentioned in the undertakings for the purpose of disregarding them. If the undertakings are not to be taken into account by the Estates Commissioners, for what purpose is the negotiator of the sale, nominated with their approval, appointed under section 23, sub-sect. 11? With regard to the condition inserted in the offer with reference to the embankment, the Estates Commissioners have no power to insert any such condition, as, in effect, it will be an advance by the Land Commission to the vendor for the improvement of his estate out of the Land Purchase Fund. This cannot be done: *In re Crosbie's Estate* (1).

Serjeant O'Connor, *K. C.*, and *Dudley White*, for the Treasury:—

Under section 1 the zones do not apply until the price is fixed. Under section 6 the price is not fixed until the Estates Commissioners agree to buy. The prices set out in the undertakings that have been lodged are merely evidence of what the tenants are willing to give; and the Estates Commissioners are no doubt bound to have regard to this amongst other elements in estimating the price they will offer for the estate; but they are not bound to

(1) [1906] 1 I. R. 515.

adopt the prices. Even if the Estates Commissioners were bound by the provisions of section 1 in estimating the price they will offer, the transfer of liability to maintain and repair the embankment from landlord to tenant determines the judicial rent, inasmuch as it was fixed on the basis that this burden was to be borne by the landlord, and so takes the cases out of the zone section.

Wylie, J. 1907.

In re GUN'S ESTATE.

WYLIE, J. :—

June 10.

In this case the absolute owner of an estate, consisting of the townland of Sleveen, in the county of Kerry, made an application in the prescribed form to the Land Commission requesting them to inquire into the circumstances of the estate with a view to a sale thereof under section 6 of the Irish Land Act of 1903. The entire lands were in the occupation of seven tenants, of whom six were judicial and one non-judicial. Each of these tenants, with the exception of one, had, prior to the originating request, signed an undertaking to purchase his holding from the Land Commission in the event of the estate being sold, at a price which brought the case of each of the judicial tenants within what is known as the "zones," but the prices mentioned in these undertakings were fixed, and these undertakings were signed, without the sanction or authority of the Estates Commissioners and before they had estimated the price or made an offer to purchase pursuant to section 6, sub-section 1. Due inquiries pursuant to section 6 were made, and the Estates Commissioners, having considered the report of their inspector and the circumstances of the case, made an offer for the estate at a price which was the aggregate of the estimated prices made by them for the several holdings and set out in the schedule to the offer. These prices were in every case, save one, less than the prices in the above undertakings lodged by the vendor, and were, in fact, such that the purchase annuities would in every case, save one, be outside the zone limit. The vendor objected to these estimated prices, contending that, as the judicial tenants had signed undertakings to buy at prices which would bring the purchase annuities within the zones, the Estates Commissioners were, by the provisions of section 1, sub-sect. 1, of the Act of 1903, bound by these prices, and could not fix any other.

Wylie, J. 1907.

In re GUN'S ESTATE.

Some of the holdings on the estate were protected from a river by an embankment which was within the ambit of the holdings, but which had always been, before and since the fixing of the judicial rents, maintained and repaired by the vendor and his predecessor; and I have no doubt that the judicial rents were fixed on that basis. Prior to these proceedings the vendor and all the tenants, except one, entered into an agreement whereby each of the tenants was, after the sale, to be bound to maintain and keep in repair so much of the embankment as bounded his holding, and the prices mentioned in their said several undertakings to purchase were fixed on that basis. The Estates Commissioners in their said offer to purchase inserted a condition with reference to this embankment, that the vendor should, prior to the agreement for purchase, effect certain specified repairs and improvements thereon. In these circumstances counsel for the vendor, on the one hand, contend that the Estates Commissioners had no power to insert in their offer any such condition, as it would in effect be an advance by the Land Commission to the vendor out of the Land Purchase Fund for the improvement of his estate, which, it is contended, would be illegal. Counsel for the Treasury, on the other hand, contend that the transfer of liability to maintain and repair the embankment from the landlord to the tenant, by the above agreement, takes the cases out of the zone section as to prices, even if the Commissioners were otherwise bound by it, as contended for by the vendor.

Now, the first question of law submitted to me for decision is this—

1. Whether the price to be offered for the estate pursuant to section 6, sub-sect. 1, of the Irish Land Act, 1903, must be estimated upon the basis of the sums opposite to the tenants' names in the 2nd column of schedule to the memorandum submitted by the Estates Commissioners, such sums being within the zones, and being sums at which, prior to lodgment of originating request, the tenants gave to the vendor undertakings to purchase from the Land Commission; or might the price to be offered be based on the prices estimated by the Commissioners, though differing from the prices at which the tenants gave undertakings to the owners to purchase before the originating request was lodged?

It would be almost enough for me to say that I answer the latter alternative in the question in the affirmative; but as there appears to me to exist a great deal of misconception as to the meaning of the provisions contained in section 6, and also as to the way in which sect. 1, sub-sect. 1, commonly known as the zone section, operates in sect. 6 cases, *i.e.* in cases of sales of estates to the Land Commission, I would like to state as clearly as I can the view I take as to the meaning and operation of these two sections.

If an owner of land wishes to sell his estate to the Land Commission, he must proceed under sect. 6; and sub-sect. 1 of that section provides that "where the owner of an estate makes an application in the prescribed form to the Land Commission requesting them to inquire into the circumstances of the estate with a view to a sale thereof, the Land Commission may, after due inquiry, propose to purchase the estate, and, in estimating the price, shall have regard to the foregoing provisions of the Act in respect of advances, and to the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate."

Now, the first thing, therefore, the Land Commission must do, before ever *proposing* to purchase, is to make due inquiry into the circumstances of the estate, and, as is evident from sect. 6, sub-sect. 3, they must be careful to buy only on such terms as will enable them to re-sell without prospect of loss; and so, by sub-sect. 1 *they* are to estimate the price at which they will propose to buy; and, in estimating that price they are required to have regard to the foregoing provisions of the Act in respect of advances. They must, therefore, have regard to the class of persons to whom they can make advances for re-sale, viz., to occupying tenants of holdings; to the several persons mentioned in section 2; to owners under section 3, and to trustees, in certain cases, under section 4. They must have regard also to the fact that the amount of the advance, according to the class of buyer, is limited in amount, and to the fact that by sect. 1, sub-sect. 1, if they estimate the price of a holding in the occupation of a judicial tenant at such a sum as will bring the case within the zones, and the tenant afterwards agrees to buy at that price, and applies for the advance, they will be bound to make it. The Estates Commissioners are also required,

Wylie, J. 1907.

In re Gun's Estate.

in estimating the price, to have regard to the prices which the tenants and *other persons* are willing to give for their holdings and other parcels of land comprised in the estate, *i.e.*, the tenants in respect of their holdings, and other persons of the classes mentioned in sections 2, 3, and 4 in respect of other parcels of the estate of which they are not tenants. Now the section makes no distinction between the mode in which they are to have regard to the prices which tenants are willing to give, and to those which non-tenants are willing to give; nor does it distinguish between judicial and non-judicial tenants; and yet it has been seriously argued, on behalf of the vendor, that, all these different classes of persons having signed undertakings to purchase their holdings and other parcels at specified prices, the Estates Commissioners, if they intend to propose to purchase, are bound to accept and adopt the exact prices specified in the undertakings of *judicial* tenants, where they come within the zones, while in all other cases, notwithstanding the undertakings, they may estimate different prices. This argument was somehow based on the alleged effect of sect. 1, sub-sect. 1; but it seems to me to be overlooked that sect. 1, sub-sect. 1, according to its terms, does not apply at all until not only the *estate* is sold but the holdings also, and the purchase-money is fixed. I also wish to point out that in sect. 6, sub-sect. 1, there is no reference whatever to an undertaking by a tenant or other person to purchase, and it appears to me that undertakings to purchase at that stage are unnecessary; but under sect. 6, sub-sect. 2, if the owner agrees to sell the estate at the estimated price, then, unless a certain proportion of the tenants undertake to purchase at the estimated prices, the Land Commission cannot buy, notwithstanding their offer, except under the special circumstances mentioned in sub-sects. 3 and 4; and the fact that the Land Commission cannot complete the purchase of the estate unless these undertakings by the tenants to purchase are given, affords another reason why it was necessary to provide that the Land Commission, in estimating the price, should have regard to the prices which the tenants were willing to give.

In my opinion, therefore, any undertakings signed by tenants to purchase their holdings at specified sums, prior to the price being estimated by the Estates Commissioners, can only be

evidence of the prices which such tenants are willing to give for their holdings, and the Estates Commissioners, though bound to have regard to them, are not in any case bound to adopt such prices, but may fix different prices in estimating the price for which they propose to purchase. To the second question I answer "No." I do not think it is necessary to answer the first part of question 3. It is admitted by counsel for the vendor that the Estates Commissioners are not bound to make any offer, and that if the condition in question is *ultra vires*, the offer is bad, and cannot be carried out, and in any event the vendor can refuse the offer.

Wylie, J. 1907.

In re GUN'S ESTATE.

J. E. W.

The vendor appealed (1).

Appeal. Dec. 9, 10.

Jellett, K.C., and *E. J. Little*, for the appellant.

The Attorney-General (*Right Hon. R. R. Cherry*), *Serjeant O'Connor, K.C.*, and *Dudley White*, for the Treasury, were not called on.

THE COURT OF APPEAL affirmed the decision of Wylie, J., and dismissed the appeal.

Solicitors for the vendor: *Creagh & Byrne.*
Solicitor for the Treasury: *W. G. Towers.*

R. D. M.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Wylie, J.
1907.
Nov. 14, 19.
Appeal.
Dec. 2, 16.

IN THE MATTER OF THE ESTATE OF THE EARL OF BANDON (No. 2).

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 8—"*Arrears of rent . . . due*"—*Meaning of.*

The words "arrears of rent . . . due" in section 24, sub-section 8, of the Irish Land Act, 1903, mean rent which accrued due up to the gale-day immediately preceding the date of the agreements for sale, and do not include the apportioned part of the gale of rent which accrued between the said gale-day and the date of the said agreements.

QUESTION OF LAW referred by the Examiner to the Judicial Commissioner for his decision on the settling of the final schedule of incumbrances.

Among the items appearing on the final schedule, was the sum payable to the vendor under the provisions of sect. 24, subsect. 8, of the Irish Land Act, 1903. The question that now arose was, whether the arrears should be ascertained as of the gale day prior to the date of the agreements, or as of the date of the signing of the agreements, by apportioning the accruing gale. It appeared that in the former case the sum payable to the vendor would be £656 6*s.* 9*d.*, and in the latter £827 5*s.* 10*d.* The lands comprised in the originating application in respect of which the question arose were not settled lands; but, inasmuch as a similar question would arise on the settling of the final schedule in respect of certain other estates of which the vendor was tenant for life, involving a much larger sum, the trustees of the settled estates now appeared to argue the question.

H. D. Conner, K.C., and *A. M. Sullivan*, for the vendor.

W. M. Jellett, K.C., and *C. H. Darley*, for the trustees of Lord Bandon's settled estates.

Wylie, J. 1907.

In re BANDON'S ESTATE.

Nov. 19.

WYLIE, J.:—

In this case a question of some difficulty and of great importance, affecting the distribution of the purchase-money of estates sold, has been referred to me for decision by the Examiner.

Though the Act has now been in operation for four years, and the question must have been decided by the Examiners in very many cases, and the purchase-money distributed accordingly, no one has thought fit, up to the present, to take exception to the Examiners' rulings.

In this case, however, the title to a considerable sum of money depends on the answer to the question; and, as in these cases practically only one side is represented before the Examiner, he has raised the question himself on his rulings. The question shortly is, what is the meaning of the words "arrears of rent" in sub-sect. 8 of sect. 24 of the Land Act of 1903? That sub-section provides as follows:—"In the case of the sale of an estate, where at the date hereinafter mentioned arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. The aforesaid date shall be, in the case of an estate purchased by the Land Commission, the date of the agreement for that purchase, and, in the case of an estate purchased by other persons, the date of the agreement for the purchase of the holding."

Now, as I have already stated, the question I have to decide is, what is the meaning of the words "arrears of rent were due" in the above sub-section? Do they mean rent due up to the gale-day next preceding the dates of the agreements mentioned in the sub-section, and at said dates remaining unpaid? or do they include an apportioned part of the current gale up to said dates? Now what I have to construe is, not the words "where rent was due or had accrued due," but the words "where *arrears* of rent were due." Are the expressions "rent due," or "rent accrued due," and "arrears of rent due," synonymous? Do they convey the same meaning? Probably, prior to the Apportionment Acts, they would have expressed the same idea, as rent then was never considered due until it was payable. But I must now

Wylie, J. 1907.

In re BANDON'S ESTATE.

take it as well settled by *Glass* v. *Patterson* (1) and other cases binding on me, that, since the Apportionment Act of 1870, rent must be considered not only accruing from day to day, as provided by sect. 2 of that Act, but as accruing *due* from day to day, so that, at any particular period in the currency of a gale, a proportionate part of that gale is due or has accrued due, and, therefore, it would now be correct to speak of that part as so much "rent due." But then sect. 3 of the same Act provides that such apportioned part shall only be payable and recoverable in the case of a continuing rent when the entire portion, of which such apportioned part shall form part, shall become due and payable, and, in the case of rent determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not been determined, and not before. Therefore, under the Apportionment Act, though an apportioned part of a gale of rent is due, or has accrued due, at a particular date, it is not payable or recoverable at that date.

How can rent be properly said to be in *arrear* until it is *payable*? I have been referred to no authority that covers this question, nor have I been able to find any: so, in the absence of any authority, I must answer the question for myself as best I can, and, in my opinion, "*arrears* of rent" means rent behind in *payment*. Therefore, construing sub-sect. 8 by itself, I would hold, notwithstanding the Apportionment Act, that the *arrears* of rent that were due at the date of the agreements for purchase in this case did not include the apportioned part of the gale of rent commencing at the gale-day next preceding the date of the agreements.

But the words "arrears of rent" occur in other sections of the Act of 1903, and also in prior Land Purchase Acts, with which the Act of 1903 is to be construed. By sect. 35 of the Act of 1896 it is provided that where an agreement for the purchase of a holding is lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including "all rent and *arrears* existing at such a date."

(1) [1902] 2 I. R. 660.

Now, what is the meaning of "all rent and arrears"? To what do the words "rent" and "arrears" respectively apply? Can "rent" apply to anything else except the portion of the current gale up to the date of the agreement, and "arrears" to so much of the preceding or earlier gales as remained unpaid? The only case which I have been able to find in which the words "rent and arrears of rent" received a construction by the Court is the case of *Sealy* v. *Stawell* (1), where a tenant for life of a certain estate devised it to the remainderman "with all rent and arrears of rent due on said property at his death"; and the question was raised whether the apportioned part of the accruing gale passed under the bequest. The Master of the Rolls, in construing the clause, decided that the accruing rent was included in the gift, and said, "It is difficult to give a meaning to the word 'rent' as distinguished from 'arrears of rent,' except by holding that it applies directly to the apportioned share of the accruing rents." Now this sect. 35 of the Act, 1896, as well as sub-sect. 8 of sect. 24 of the Act of 1903, applies to the case I am now dealing with; and, reading them together, as directed by sect. 100 of the Act of 1903, they would run as follows:—The purchaser shall, in the event of the sale being carried out, be discharged from "all rent and arrears" existing at the date of the agreement; but in case of the sale of an estate, where, at the date of the agreement for the purchase of a holding, "*arrears* of rent" were due in respect of the holding, a sum equivalent in amount to those arrears, not exceeding one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. If, therefore, I am right in my construction of the words "rent and arrears" in sect. 35, it follows, I think, from reading this section with sub-sect. 8, which omits the word "rent," that the words "*arrears* of rent" in this sub-section were not intended to include an apportioned part of the current gale of rent.

The words "arrears of rent" also occur in several other sections of the Land Purchase Acts—for example, in sect. 40, sub-sect. 1*b*, of the Act of 1896, and sect. 7, sub-sect. 5, of the Act of

(1) I. R. 2 Eq. 326.

Wylie, J. 1907.

In re BANDON'S ESTATE.

1903, and sect. 77, sub-sect. 2, of the same Act, with reference to sales by the Land Judge under the Land Purchase Acts; and it is to be noticed that the words used in all these sections are "arrears of rent," and not "rent and arrears" used in sect. 35, sub-sect. 1, of the Act of 1896. The distinction between the two cases is, I think, accounted for by the fact that, according to the practice of the Land Judge, the current gale was not apportioned on a sale, but passed in its entirety to the purchaser; and the words "arrears of rent" were used to describe the rent due up to the preceding gale-day, and remaining unpaid.

There is, however, one other point, referred to in the arguments of counsel, that I cannot pass by without some notice. It was contended that this case came within sect. 50 of the Landlord and Tenant Act, 1860, which provides that, when a tenancy determines, otherwise than by the act of the landlord, at any time before a gale-day, the landlord shall be entitled to an apportioned part of the rent. There is nothing in this section, as there is in the Apportionment Act, to postpone the time of payment. Therefore, if the conditional determination of the tenancy in this case, by the sale of the fee-simple by the landlord to the tenant, were a determination otherwise than by the act of the landlord, within the meaning of sect. 50, I think the apportioned part of the gale of rent would, so far as that section is concerned, become an arrear of rent at the date of the agreement; but sect. 35 of the Act of 1896 provides that in such a case neither the rent nor arrears can be recovered pending the carrying out of the sale.

I do not think, however, it is necessary for me to decide whether sect. 50 applies to this case, or what its effect would be if it did; because what I have to decide is the meaning of the words "arrears of rent" as used in sect. 24, sub-sect. 8, of the Act of 1903, and in that sub-section the words in question are applied to two distinct cases, one, the case of a direct sale of the fee-simple to the tenant, and the other, the case of a sale of the estate to the Land Commission, where the tenancy in the holding continues; and as, in the latter case, I am of opinion, for the reasons already given, that the words "arrears of rent" mean rent due up to the gale-day next before the date of the agreement and remaining unpaid, I think the same meaning must be given

to them when applied to the former case, and the amount of those arrears must be ascertained accordingly.

Wylie, J. 1907.

J. E. W.

In re BANDON'S ESTATE.

The vendor appealed (1).

Appeal. Dec. 2, 16.

Conner, K.C., and *A. M. Sullivan*, for the appellant:—

We contend that "arrears of rent" in sect. 24, sub-sect. 8, of the Irish Land Act, 1903, must include not merely the arrears accrued due at the gale-day previous to the signing of the purchase agreement, and remaining unpaid, but also an apportioned part of the current gale up to the actual date of such agreement. When the vendor is absolute owner, the question does not arise; but where, as here, he is a limited owner, the construction of the section adopted by Mr. Justice Wylie would work great hardship, and is contrary to the spirit of the section. It cannot have been intended by the Legislature that when a limited owner signs a purchase agreement on an actual gale-day, he should be entitled to a sum equivalent to the arrears of rent up to that day, whereas if he had signed the agreement on the previous day, he would have been entitled to nothing in respect of rent accruing since the prior gale-day. The rights of a vendor cannot vary according to the date on which he signs the agreement. Under the Apportionment Act, 1870, rent accrues from day to day; and, therefore, an apportioned part of the current gale is strictly included in "arrears of rent." The judgment of Jessel, M.R., in *Hasluck* v. *Pedley* (2), followed by Fry, L.J., in *Re Lucas* (3), is in favour of our contention: *Glass* v. *Patterson* (4); *Bishop of Rochester* v. *Le Fanu* (5).

Apart from the Apportionment Act, 1870, we rely on sect. 50 of Deasy's Act, which entitles a landlord, when the tenancy has been determined otherwise than by his own act, to "a reasonable proportion of the rent according to the time that has elapsed from

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) L. R. 19 Eq. 271.

(3) 55 L. J., Ch. 103.

(4) [1902] 2 I. R. 660.

(5) [1906] 2 Ch. 513.

Appeal. 1907.

In re BANDON'S ESTATE.

the commencement of the tenancy, *or the last gale-day*, to the day of the determination of such tenancy, including such day." That section was considered in *Re Leeks* (1), when this Court decided that upon a disclaimer by assignees of a bankrupt of his interest in a lease, the lessor is entitled to prove in bankruptcy for the apportioned part of the rent accrued due between the last gale-day and the date of adjudication.

The construction we contend for is consistent with that placed upon the expression "arrears of rent" in other sections of the Land Code. Thus, in sect. 40 (1*b*) of the Act of 1896 "arrears of rent" clearly include all rent up to the date of sale, irrespective of gale-days: see *Re Blake* (2). So also in sects. 7 and 57 of the Act of 1903 "arrears of rent" must mean arrears to date. [They also referred to *Vickery* v. *Deane* (3) and *Carlisle* v. *Gosford* (4).]

Jellett, K.C., and Darley, for the respondents:—

"Arrears of rent . . . due" at the date mentioned in sub-s. 4 must mean arrears actually due and payable, and nothing more. The expression is used in its colloquial sense, as signifying arrears of rent actually recoverable by the landlord. No argument can be based by the appellant on the Apportionment Act, 1870, as that Act does not alter the date at which rent becomes due and payable: *The United Club and Hotel Company* (5). It must be borne in mind that the clause is limited; the person entitled to the arrears is to be paid out of the purchase-money, not a sum equivalent to all the arrears of rent due in respect of the holding, but an amount not exceeding one year's rent. There is no hardship on the vendor, as he is master of the situation, and can sign the purchase-agreement on any day he chooses; if there are arrears due, he can wait until the gale-day. Section 50 of Deasy's Act has no application to a case such as the present. Moreover, that section is in terms limited to cases where the tenancy is determined "otherwise than by the act of the landlord"; here the tenancy was determined by the act of the landlord. Little assistance is to be gained by consider-

(1) [1902] 2 I. R. 339.
(2) 37 I. L. T. R. 37.
(3) 32 L. R. Ir. 36.
(4) 36 I. L. T. R. 220.
(5) 60 L. T. (N. S.) 665.

Appeal. 1907.

In re BANDON'S ESTATE.

ing the meaning of the expression "arrears of rent" in other sections of the Land Acts; but it is incorrect to say that that expression always includes arrears to date irrespective of gale-days. The first section in which it is to be found is sect. 1, sub-sect. 9, of the Act of 1881, where it is clear that what is indicated is the amount of rent actually payable to the landlord, and remaining unpaid. In sect. 35 of the Act of 1896 the words used are "rent and arrears," which may include an apportioned part of the accruing rent; but in the section now under consideration we have only the words "arrears of rent . . . due."

Again, "arrears of rent" in sect. 7, sub-sect. 5, and sect. 18, sub-sect. 1, of the Act of 1903 must mean arrears of rent accrued due at the last gale-day, otherwise the order of the Land Judge could not vest in the Land Commission a right to "collect and recover" such arrears, as mentioned in the former section, nor could the arrears mentioned in the latter section be "payable to and recoverable by" the Land Commission in the manner prescribed. So also in sect. 57, sub-sect. 4, of the Act of 1903, the "one year's arrears of rent" recoverable from a tenant, where an offer of the Land Judge for the sale of a holding to such tenant has been accepted, must mean one year's arrears from gale-day to gale-day. The same meaning must be given to "arrears of rent" in sect. 77, sub-sect. 2, of the Act of 1903.

Conner, K.C., in reply.

Dec. 16.

THE LORD CHANCELLOR:—

In this case Lord Bandon's estates are being sold under the Land Purchase Acts. As regards one he is owner in fee, and as regards another he is tenant for life. There was an agreement for the purchase in each case. The purchase-money was being distributed; and a question arose as to the amount which the vendor was entitled to receive out of the purchase-money under sect. 24, sub-sect. 8, of the Irish Land Act, 1903. The way in which the construction became material is, that at the date of the agreement for purchase there was a half-year's rent due to last gale-day amounting to £656 odd on the rental; but if the apportioned part to date of agreement were included, there would be £827 odd

Appeal. 1907.

In re BANDON'S ESTATE.

The Lord Chancellor.

payable. Section 24, sub-section 8, is in the following terms:— [The Lord Chancellor read the sub-section.]

I have no doubt this payment out of the purchase-money was given to the landlord as compensation for being deprived of arrears by force of his agreement to sell under legislation preceding the Act of 1903. It is really only material when the landlord is tenant for life; but for the purpose of having the question decided, we are to be taken under a consent for the purpose given to have the tenant for life also claiming.

Under the Apportionment Act of 1870 rent is to be deemed to be accruing from day to day, and apportionable accordingly; but, nevertheless, the apportioned part is to be payable or recoverable in the case of a continuing rent, when the entire portion of which such apportioned part forms part shall become due and payable, and not before; and, in the case of a rent determined by death, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Now, as this sub-sect. 8 refers to the date of the agreement for purchase as fully ascertaining "arrears of rent," it is material to see what had been done by force of the agreement for purchase in respect of "arrears of rent" under the Act of 1896, which provides for the effect of the agreement for purchase.

Sections 35 and 40 of the Act of 1896 are the important sections; sect. 35 deals with the case of a tenant buying from his landlord. [His Lordship read the section.] I think it is impossible to contend that under this section the apportioned part to date of agreement is not discharged. In the first place, it follows from the words "all rent and arrears"; and if the liability for all rent is discharged, I do not see how there can be an apportioned part undischarged; besides, the tenant himself who buys would be the person to receive the entire gale when it accrued, and this is strengthened by the proviso which controls a vested right of action.

Then comes the 40th section, sub-sect. (*b*). The offer is to sell to him the fee-simple of the holding "discharged from the arrears of rent then due from him in respect thereof." This, of course, also involves the construction of the word "arrears," as does sub-sect. 8 of sect. 24; but sub-sect. (*c*) of sect. 40 says that on the acceptance

of the offer the person accepting shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts, so that he is subject to the provisions of sect. 35 preceding.

Before I go back to the sub-section, I should like to refer to section 57 of the Act of 1903. [The Lord Chancellor read the section.] We must remember that interest on the purchase-money is given for the benefit of the landlord from the date of the agreement.

The words "arrears of rent" occur in sect. 57, sub-sect. 4, where I think the words "one year's arrears of rent" must refer to an ascertainment by gales. An argument was addressed to us founded upon sect. 50 of Deasy's Act. I have nothing to add to the observations of Mr. Justice Wylie in reply to this argument. Coming back to sect. 24, sub-sect. 8, what is the construction of "arrears of rent"? In the first place, I think arrears means a sum due and recoverable, but not enforced. That is implied in the word and its derivation, and it is coupled with the words "were due," which, I think, mean capable of being recovered, and the maximum is "one year's rent," and the sum is to be paid to the persons who would have been entitled to receive these arrears, which includes the right to recover them.

Therefore, whether looking to what has been taken from the vendor by preceding legislation, or the very language used in sub-sect. 8, when the legislation came to compensate him, I think that "arrears" has been rightly interpreted by Mr. Justice Wylie, and the appeal should be dismissed.

Fitz Gibbon, L.J.:—

I have looked carefully at all the sections of the Land Acts in which "arrears of rent" are mentioned, in order to see whether that expression, where it occurs in the Act of 1903, sect. 24, bears any special meaning; and on that point the stage at which sect. 24 comes into operation, and the parties who alone are then interested, seem to me to be material.

There are several sections in which the expressions "rent and arrears of rent" or "arrears of rent" occur; and in one at least—the Act of 1896, sect. 40—"arrears of rent" without mention of "rent" must, in effect, be co-extensive with "rent and arrears of

Appeal. 1907.

In re BANDON'S ESTATE.

Fitz Gibbon, L.J.

rent." But all these are cases where the effect of the sale of a holding to a tenant is concerned, and there can be no doubt that it is a leading provision of the Act, to which there is no qualification, that whenever the tenant becomes a purchaser of his holding, he is *ipso facto* absolutely discharged from liability of every kind with respect to rent due or accruing up to the date of the sale, irrespectively of the words used in these sections, and that all such liability, though it may be dealt with by previous agreement, must end with the vesting of the holding in the purchaser.

Let us see how, in ordinary cases, the rent due or accruing is usually dealt with upon the sale, as between the landlord vendor, whether a limited owner or not, and the tenant purchaser. The landlord generally agrees to take so many years purchase, and the tenant to take an advance which will give him a certain percentage of reduction of his rent. If the tenant owes heavy arrears, the landlord makes him pay what he can on account, or adds something to the purchase-money, forgiving the rest; but in every case some definite arrangement must be made, discharging all liability for rent. It would appear to me to be equally lawful to agree (i) that all liability for rent shall be discharged in consideration of the purchase-money, without saying more; or (ii) to say, "pay half a year's rent"; or (iii) to say "pay all rent due, and also apportioned rent up to the date of the agreement"; but, as pointed out in *Dayrolles Crosbie's Case* (1), the state of the rent account, and the mode of dealing with the rent and arrears, will always be elements in fixing the purchase-money by the contract between the landlord and tenant, always bearing in mind that, whatever they do, whenever the agreement becomes operative all liability for rent, whether accruing or in arrear, must end. I should think it almost certain that, in practice, the payment of rent for the current gale *de die in diem* up to the date of the agreement, as distinguished from covering it by the purchase-money, is unusual.

When section 24 is reached, that stage is past; at "the distribution of the purchase-money" the tenant is out of the case, and whether "arrears of rent" are to be segregated from the

(1) [1907] 1 I. R. 116, 124.

capital price of the land, is merely a question between one pocket and the other of a vendor who is an absolute owner, though it may be material between him and incumbrancers in some cases, and it is certainly material between him and remaindermen, where he is a limited owner.

Section 24 comes in for the distribution of the purchase-money only. It is mandatory in so far as it directs that, where it applies, there *shall be paid* out of the purchase-money "arrears of rent" due in respect of the holding not exceeding one year's rent.

I see no reason to suppose that, in dealing with the tenant, the vendor landlord made any special stipulation for payment of the accruing gale of rent. If he had done so, he could not afterwards get it again out of the purchase-money.

To whatever extent purchase-money is applied to the payment of rent, whether accruing or in arrear, it is a withdrawal of capital representing the land for the benefit of the person entitled to the rents and profits; it is reducing that capital for the benefit of a vendor who is selling at a price fixed by himself, and who had power to stipulate for the payment of the rent by the tenant, but has not done so. Knowing that "arrears of rent" existed, and seeing that limited owners, if they sold, would have to discharge them, Parliament gave a limited right to treat part of the purchase-money as being the price of income; and so far as Parliament has sanctioned it, a limited owner who sells the land for a certain sum, may treat the purchase-money as representing the income released, as distinct from the land sold.

I cannot see that, at the stage when section 24 is reached, we can give any special meaning to the words "arrears of rent due" at a specific date. The ordinary meaning is rent due *and payable*, and *in arrear*. The provision is made, so far as it extends, for converting what *prima facie* is capital into income, and giving it to the owner of the rents and profits, towards recouping him for his loss in accepting a capital price for the estate which satisfies all his claims for rent due or accruing. Where there were "arrears of rent *due*," Parliament gave him "a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent," and the language used goes far to show that Parliament never

Appeal. 1907. *In re* BANDON'S ESTATE. Fitz Gibbon, L.J.

contemplated the result which would follow from allowing this appeal, viz., that in every case in which a distribution of purchase-money takes place under section 24, the Land Commission must deduct from the purchase-money, and pay to the vendor as income, an apportioned sum calculated *de die in diem* back from the date of the agreement for sale to the day up to which the rent was paid by the tenant, not exceeding 365 days, or 366 days in leap year. This calculation would be mandatory, in every case in which the agreement was not made on the gale-day.

Wylie, J., has referred, rather enigmatically, to the fact that this question is now raised for the first time. Whether different examiners have acted differently, or whether all of them have apportioned the purchase-money, or whether someone has now for the first time suggested it, their rulings have not been quarrelled with. But this can make no difference in our judgment, and in agreeing with the Lord Chancellor that the appeal must be dismissed, I am glad to think that the arithmetical duties of the examiners will be simplified.

HOLMES, L.J.:—

The question in this case arises on the construction of the 8th sub-section of section 24 of the Irish Land Act, 1903, which provides that in the case of the sale of an estate where, at the date of the agreement for the purchase, arrears of rent were due in respect of any holding on the estate, a sum, equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive such arrears for his own use. The question arises in the present case between a tenant for life and trustees, who subject to such life estate, hold for the uses and trusts declared in a settlement of the 19th June, 1876; and, although there have probably been some instances of a similar conflict of interests in the distribution of purchase-money by the Land Commission during the last four years, no one has heretofore taken exception to the rulings of the examiners. We have no accurate information as to the principle on which these rulings were made. Counsel on each side claims that the sub-section has been construed in his favour; and in any case we must now decide

the point by our independent judgment. There are no words relating to land more frequently used and better understood in Ireland than "arrears of rent."

Although, since the Apportionment Act of 1870, rent, like interest on money lent, is considered as accruing from day to day, no one has supposed that rent is in arrear until it becomes payable. Giving words their ordinary meaning, as I always do in construing a statute, unless I am obliged by the context to interpret them otherwise, I should have no doubt that in sub-section 8 arrears of rent mean rent due up to the gale-day preceding the agreement, and recoverable at that date; and I should hold that they do not include any rent accruing due in the interval between such gale-day and the making of the agreement. This would be the construction of the sub-section taken by itself; and I find nothing in the other sub-sections, twelve in number, of section 24, calculated to lead me to a different conclusion.

"Arrears of rent" occur in other sections of the Act of 1903; and the opposing counsel have claimed that they support their respective contentions, but I think they give no help. I now turn for guidance to the provision in the Land Law (Ireland) Act, 1896, that I think suggested the sub-section under consideration. I mean section 35, which enacts that where an agreement for the purchase of a holding is made thereafter, and is lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including all rent and arrears existing at such date. These would certainly include the rent accruing due from the previous gale-day to the date of the agreement; but the difference of the language is remarkable—"all rent and arrears." My reason for thinking that it was this provision that suggested sub-section 8 is that the latter seems to be intended in certain cases to give some compensation out of the purchase-money to a vendor who, by entering into the agreement to sell, has been deprived of a right which he would otherwise possess, but the compensation is confined to an amount of arrears of rent not exceeding in any case one year's rent.

Appeal. 1907.

In re BANDON'S ESTATE.

Holmes, L.J.

I do not attach much importance to the comparison I have made, but so far as it has any, it is in favour of the construction adopted by Mr. Justice Wylie. Section 40 of the Act of 1896 has been referred to. The offer to be made as therein provided by the Land Judge to the tenant, is to sell to him the fee-simple of his holding, discharged from the arrears of rent then due from him in respect thereof. It is argued that it was not contemplated that the tenant, if he were to accept the offer, would remain liable to rent for the broken period between the previous gale-day and the offer. It certainly was not, for the section goes on to say, if the offer is accepted then on fulfilment of the conditions, the tenant shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts. He is thus given the advantage of sub-sect. 35, which frees him from liability not only for all arrears but also for all rent. Finding, therefore, in the Land Purchase code no reason for giving "arrears" in sect. 24 of the Act of 1903 any construction other than their usual and natural meaning, I am of opinion that the appeal must be disallowed. The argument based on section 50 of Deasy's Act to which Mr. Justice Wylie refers was not I think relied on in this Court. That section relates to a tenancy that is determined otherwise than by the act of the landlord, and is not applicable where the determination of the tenancy is brought about by the voluntary act of the landlord in agreeing to sell.

Solicitor for the vendor : *Clifford Lloyd.*
Solicitors for the trustees : *Maunsell, Darley, & Orpen.*

R. ST. J. C.

STAPLES *v.* YOUNG.

Ross, J.
1907.
July 11, 12.
Appeal.
Dec. 16.
1908.
Jan. 20.

Mines and minerals—Reservation of—Sand—Right of agricultural tenant to remove sand from holding.

In applying the rule in *Hext* v. *Gill* (L. R. 7 Ch. App. 699) to the construction of a reservation by deed of mines and minerals, the Court must take into consideration all the circumstances of the particular case, the true nature of the transaction between the parties, and their real object as evidenced by the subject-matter of the grant.

The plaintiff, who, in 1864, became entitled, under a Landed Estates Court conveyance, to an undivided moiety of a nominal fee-farm rent reserved by, and the benefit of a reservation of mines and minerals contained in, a fee-farm grant executed in 1632 by the owner in fee of lands, of which the defendant's holding now forms portion, sought to restrain the defendant from removing from the holding for non-agricultural purposes sand, which the plaintiff claimed to be included as a "mineral" in the reservation. The defendant's holding, save as to some 6 to 10 inches at the surface, consisted of pure sand to the depth of many feet, the layer at the surface being soil, comprised, as to five-sixths thereof, of pure sand, and, as to the remainder, of decomposed vegetable matter:—

Held, by the Court of Appeal (reversing the decision of Ross, J.), that the sand in the holding was not included in the reservation of "mines and minerals" in the deed in question, and that the action should be dismissed.

Hext v. *Gill* (L. R. 7 Ch. App. 699) considered.

Semble: A memorial of a Landed Estates Court conveyance lodged in the Registry of Deeds, being a duplicate of the original conveyance, may be received in evidence without proof of the loss of the original.

ACTION brought by Sir John Molesworth Staples, Bart., for an injunction restraining the defendant, his servants, agents, and licensees, from raising and taking away sand on and from the lands of Brackaville, in his possession, and for an inquiry as to the damages sustained by the plaintiff by the removal of sand from the lands by the defendant, and payment of the sum found to be due.

By indenture, dated 12th December, 1632, Sir Andrew Stewart granted to John Nicholson, his heirs and assigns, in

Ross, J. 1907.

STAPLES v. YOUNG.

fee-farm for ever, all the lands of Brackaville and Derry, subject to the rent of £4, "excepted and always reserved out of the said grant unto the said Sir Andrew Stewart, his heirs and assigns, free liberty with ingress, egress and regress in and through the premises, to hawk, hunt and fowl, and the use and benefit of all mines and minerals that could or might be had or found in and upon the said granted premises, and the benefit of all other royalties whatsoever belonging to the manor of Castlestewart." This grant was confirmed by a subsequent grant dated 19th June, 1672, from the Earl of Suffolk to William Nicholson.

By Landed Estates Court conveyance, dated 26th April, 1864, the said yearly fee-farm rent of £4, and the use and benefit of the said mines and minerals, and the benefit of all other royalties whatsoever belonging to the manor of Castlestewart, and also all mines and minerals of what nature or kind soever of the other lands therein mentioned, with free liberty to get, dig, and carry the same away, were granted to Sir Thomas Staples and James Alfred Caulfield, their heirs and assigns. The plaintiff was the successor in title of Sir Thomas Staples, and entitled to his moiety.

The defendant was one of the tenants on the lands of Brackaville, and had, along with the other tenants of Brackaville and Derry, lately agreed to purchase his holding under the Land Purchase Acts from his landlord, the successor in title of the fee-farm grantee in the grant above mentioned. The defendant had for some time persisted in taking away sand out of his holding and selling it at a profit. From the evidence of the witnesses at the trial it appeared that the entire of Brackaville and Derry consisted of sand, and that there was an agricultural surface of about 8½ to 10 inches, composed for the most part of sand, in the proportion of five-sixths of sand and one-sixth of vegetable matter. The other facts appear in the judgments.

Jellett, K.C., and *Hewitt R. Poole*, for the plaintiff.

James O'Connor, for the defendant.

Ross, J. :—

Ross, J.
1907.
STAPLES
v.
YOUNG.

As this case is one which, owing to the conflict of law on the points involved, is likely to be taken further, I do not think it would be right to put the parties to the cost of my reserving judgment. I therefore proceed to pronounce my opinion on the case as it presents itself to me now.

The plaintiff, who is a person of unsound mind, has brought the action for an injunction to restrain the defendant, his agents, and servants, from raising and taking away sand from the lands of Brackaville in the defendant's possession. The plaintiff is the owner of a moiety of fee-farm rent of £4 issuing out of the lands, and also to the use and benefit of the mines and minerals. His title goes back to the time of Charles 1. A grant was made by one Sir Andrew Stewart to John Nicholson in 1632, and it was in 1672 confirmed by a grant from the Earl of Suffolk and others. The rent of £4 thereby reserved, and the use and benefit of all mines and minerals, became the property in equal shares of the Caulfield family and the Staples family. A petition for sale was presented, which included the Caulfield moiety and the Staples moiety; and by Landed Estates Court conveyance, dated 26th April, 1864, the yearly fee-farm rent of £4, and the use and benefit of the mines and minerals, and the benefit of all other royalties whatsoever, belonging to the manor of Castlestewart, were granted to Sir Thomas Staples and James Alfred Caulfield. The plaintiff is the successor in title of Sir Thomas Staples, and is entitled to his moiety.

In the first place, the subject-matter of the original grant was a large tract of lands, the lands of Derry and Brackaville in Tyrone, in the hands of a great many lessees. In the original grant there was a reservation of mines and minerals. The defendant's case here is that this particular small farm of Joseph Young—consisting of only about 4 acres—is sand, and nothing but sand, and that, therefore, there can be no reservation such as is claimed by the plaintiff, because it, the sand, is the subject-matter of the grant itself.

As an illustration of the defendant's argument—suppose there were a lease of the Giant's Causeway and a reservation of mines and minerals, it would be inconsistent with the estate granted if

Ross, J. 1907.

STAPLES v. YOUNG.

the lessor were to claim the actual rocks, because he had demised the rocks, and because they alone could be the subject-matter of the demise.

The evidence of the plaintiff and of the defendant does not differ very much—the evidence is that there is an agricultural surface of about 8½ to 10 inches, composed for the most part of sand. One of the experts for the defence says that five-sixths of the agricultural surface is sand; but the other expert called for the defendant is not ready to corroborate this, and my belief is that if bag No. 1 is a fair sample—and it was admitted to be so—there is not so large a proportion of sand.

At all events there is this agricultural surface, of whatever depth, cultivated for many years. The defendant bought the tenant's interest some years ago, but he did not get a fair rent fixed till 1903, from which I infer that the rent was not very excessive, or he would before that have taken his landlord into Court. But in 1903 he did take him into Court, and there was a fair rent of £3 13*s.* fixed—only a slight reduction on the original rent. What defendant bought was the tenant's interest, and that must have been valued as if it were agricultural land. Below this agricultural surface is a zone of sand which would not be useful for building purposes, because it is impregnated with vegetable matter,and would therefore retain damp; but when you cut below this again, you come to sand which is suitable for building purposes. The evidence is, that at this latter point you get pure sand, and still further down you arrive at a belt of blue clay which will hold water. Counsel for the defence in his very able argument has pressed me to hold that what is a mineral in one field is not a mineral in another. We are not now at the beginning of the discussion. The decisions have been numerous and conflicting. I am not in a position to throw any new light on the subject. I think that on the facts above stated, there is a binding decision in Ireland which settles the matter.

I allude to the decision of the Court of Appeal: *Fishbourne* v. *Hamilton* (1), following a decision of the Court of Appeal in England: *The Earl of Jersey* v. *Guardians of Neath Union* (2).

(1) 25 L. R. Ir. 483. (2) 22 Q. B. D. 555.

Both these judgments were delivered since the controversy was raised.

In *Fishbourne* v. *Hamilton* (1), the question was whether the reservation of mines and minerals included beds of limestone. We have the same elements in that case as in this. There they had the agricultural surface, and the limestone under it. Here we have the agricultural surface, and the sand under it. I cannot see how any ingenuity can differentiate between the cases.

I therefore hold that the plaintiff is entitled to the remedy asked for, and I accordingly grant the injunction with costs, the plaintiff waiving his right to an inquiry as to damages.

D. M. S.

Appeal.
Dec. 16.
1908.
Jan. 20.

The defendant appealed (2).

James O'Connor and *Devitt*, for the appellant :—

In construing this reservation of "mines and minerals" regard must be had to all the circumstances of the case, and the intention of the parties to the original grant considered : *Bell* v. *Wilson* (3); *Great Western Railway Company* v. *Blades* (4). The defendant's holding is in a district where mines of coal and fire-clay abound, and the reservation was intended to operate on such mines, and not on the sand which constituted the very subject-matter of the grant. If the plaintiff succeeds in this action, it is open to him to remove all the sand from the holding, and leave nothing whatever for the defendant, who has got a fair rent fixed upon the holding on the basis of its being an ordinary agricultural holding consisting of sandy loam, and has now signed a purchase agreement. It is, in the words of Kindersley, V.-C., in *Bell* v. *Wilson* (3), "so unnatural and unlikely" that the parties to the original grant could have intended any such consequence to flow from the reservation, that the Court should hold "sand" to be excluded.

(1) 25 L. R. Ir. 483.

(2) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(3) 2 Dr. & Sm. 395; L. R. 1 Ch. App. 303.

(4) [1901] 2 Ch. 624.

Appeal. 1907. STAPLES v. YOUNG.

We are not concerned to argue that *Hext* v. *Gill* (1) is not now good law, as, though sand may come within the definition of minerals there laid down by Mellish, L.J., this case cannot be determined by reference to any abstract definition. In *Attorney-General for the Isle of Man* v. *Mylchreest* (2) Sir Montague E. Smith points out that, although "minerals" in its scientific and widest sense may include clay and sand, it may be shown by the context, nature, and circumstances of the transaction, or by usage, that in the particular instrument to be considered it is employed in a narrower sense, not embracing such substances. Since the date of the original grant, until this claim was asserted, it was never suggested that the sand in the holding came within the reservation. In *Brown* v. *Chadwick* (3) it was decided that a reservation of "all mines, minerals, and other royalties whatsoever, with liberty to search for, take, raise, manufacture on the premises, and cart away the same," did not include open limestone quarries, which the lessee had been in the habit of working. Monahan, C.J., there said that if the plaintiff could succeed in the action, he would be entitled to take possession, not merely of the rocks and stones, but of the land itself. That is our case: *Listowell* v. *Gibbings* (4); *Darvill* v. *Roper* (5).

Jellett, K.C., and *Poole*, for the respondent:—

The respondent does not seek to interfere with the user of the holding as an agricultural farm; the appellant is entitled to use the sand on the surface as a productive element, but not to cart it away from the sub-soil as a mineral. In *Hext* v. *Gill* (1) Mellish, L.J., laid down the proposition, as a result of the authorities, that "a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Doubt was thrown on that decision by Lord Halsbury in *Lord Provost and Magistrates of Glasgow* v. *Farie* (6), where it was

(1) L. R. 7 Ch. App. 699.
(2) 4 A. C. 294, at p. 305.
(3) 7 Ir. C. L. R. 101.
(4) 9 Ir. C. L. R. 223.
(5) 3 Dr. 294.
(6) 13 A. C. 657.

held that common clay, forming the surface or substance of land, was not included in the reservation of the 18th section of the Waterworks Clauses Act, 1847; but this Court, in *Fishbourne* v. *Hamilton* (1), considered and approved of *Hext* v. *Gill* (2); and in *Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union* (3) Lord Esher expressed the opinion that the rule laid down in that case was absolutely right. See also judgment of Bowen, L.J.

Appeal. 1907.

STAPLES v. YOUNG.

If *Hext* v. *Gill* (2) and *Fishbourne* v. *Hamilton* (1) were rightly decided, this appeal must fail. In *Midland Railway Company* v. *Checkley* (4) Lord Romilly said—"Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word 'mineral.'" Different considerations apply to a case dependent upon the operation of a statute, such as *Attorney-General for the Isle of Man* v. *Mylchreest* (5), and *Midland Railway Co.* v. *Haunchwood Brick and Tile Co.* (6), from those which arise in a case where the relations exist by contract or grant: *per* Buckley, J., in *Great Western Railway Co.* v. *Blades* (7); *Midland Railway Co.* v. *Robinson* (8). In the grant under consideration there is nothing to restrict the meaning of "minerals," which should be given its widest meaning. [They also referred to *Scott* v. *Midland Railway Co.* (9), and sect. 13, sub-sect. 3, of the Irish Land Act, 1903; MacSwinney on Mines, p. 12.]

O'Connor, in reply.

THE LORD CHANCELLOR:—

1908. Jan. 20.

The question in this action is whether the plaintiff, who is the owner of an undivided moiety of mines and minerals to be found on certain lands in the county of Tyrone called Derry and Brackaville, is entitled by reason of his mineral rights to prevent

(1) 25 L. R. Ir. 483.
(2) L. R. 7 Ch. App. 699.
(3) 22 Q. B. D. 555, at p. 559.
(4) L. R. 4 Eq. 19, at p. 25.
(5) 4 A. C. 294.
(6) 20 Ch. D. 552.
(7) [1901] 2 Ch. 624, at p. 632.
(8) 15 A. C. 19.
(9) [1901] 1 Q. B. 317.

Appeal. 1908.

STAPLES v. YOUNG.

The Lord Chancellor.

the defendant, a tenant on the lands, from taking sand out of the land included in his holding. The plaintiff contends that the sand is a mineral within the reservation. It appears that by a grant bearing date 19th June, 1672, 24 Car. 2, which confirmed a previous grant of 7 Car. 1, certain lands in the county of Tyrone, called Derry and Brackaville, containing some 49 acres, Irish, forming part of the manor of Castlestewart, were granted in fee-farm to a grantee, reserving a perpetual fee-farm rent of £4, Irish, and also the use and benefit of all mines and minerals to be found on the lands in question.

The title of the plaintiff and his co-owner is derived under a Landed Estates Court conveyance, dated 26th April, 1864, by which this perpetual rent of £4 Irish, equal to £3 13*s.* 10*d.* sterling, and the use and benefit of all the minerals to be found on Brackaville and Derry, and all royalties belonging to the manor of Castlestewart, were granted to Sir Thomas Staples and James Alfred Caulfield. This grant also includes another fee-farm rent issuing out of other lands in the same county, and mines and minerals therein, adding with free liberty to get, dig, and carry away the same.

The plaintiff, Staples, is the successor in title to the undivided moiety of Sir Thomas Staples; but Lord Charlemont, who is the owner of the other undivided moiety, is not a party to the action. The plaintiff is a lunatic, so found by inquisition, and sues by his committee. It does not appear that any order of the Lord Chancellor was made to institute this action at the risk of the lunatic alone; but that does not affect the rights as between plaintiff and defendant.

The lands are in the hands of agricultural tenants, and Joseph Young, who is the defendant, is yearly tenant of 4A. 3R. 29P., statute measure, held originally at £3 13*s.* 7*d.*, but in 1903 a fair rent of £3 10*s.* was fixed on the holding, which is an agricultural or pastoral one, and he has entered into an agreement for purchase not yet carried out. There are valuable minerals of coal and fire-clay beneath the lands included in the grant, which have been the subject of separate lettings, and a lease of them, now expired, dated 1852, is scheduled to the Landed Estates conveyance of 1864. This demised coal-mines, coal-pits,

collieries, seams, and veins of coal, open or not, with liberty to dig and take them. Recently a controversy has arisen as to the rights under the reservation to take and sell sand for building purposes out of the lands demised to Young. About 1904 a letting of this alleged right in a portion of the land was made to a man named O'Farrell, who paid 3*d.* a load as royalty, but he has ceased to pay.

Young, in 1905 or 1906, opened a sand-pit on his holding, and has been removing and selling the sand. He states his object has been to reclaim the lands by removing sand below and replacing the surface; and he insists that the plaintiff and his co-owner have no property in the sand under the reservation, and he has appealed from a judgment of Mr. Justice Ross, who granted an injunction to restrain him.

It is admitted that the question between plaintiff and defendant is one of property, viz., whether the sand is a mineral within the meaning of the reservation as between the co-owners and the agricultural tenant Young. It is proved that Young's lands are the same in character as the other lands in Brackaville. The case has involved the discussion of a wide range of cases, including several in the House of Lords, in which the opinions expressed are not altogether easy to reconcile.

But there are principles deducible from the cases, including one in our own Court, by which we must be guided and governed.

1. Though a reservation uses only the words "mines and minerals," and there may be in the district covered by it a subject-matter such as coal and iron which would in the popular sense furnish a subject for the reservation, any substance which is a mineral in the view of the law may, notwithstanding, be covered by the reservation.

2. That in construing in Ireland a grant of the date in question, it must be taken that there is attached to the reservation a statutory right to break the surface and take the mineral if it exists, making compensation to the tenant for damage done.

3. That *Hext* v. *Gill* (1) and the rule laid down by Mellish, L.J., in that much discussed case have not been overruled, and must govern the construction of every grant to which they apply,

(1) L. R. 7 Ch. App. 699.

Appeal. 1908.

STAPLES *v.* YOUNG.

The Lord Chancellor.

but that those rules must be applied, taking into account the circumstances of the case, the true nature of the transaction, and the real object of the parties as evidenced by the subject-matter of the grant or letting.

In the case before us, when all the authorities have been examined, I think we are remitted to the facts of the particular case.

The decision in *Fishbourne* v. *Hamilton* (1) seems to me absolutely clear. The subject there was beds of limestone lying beneath the surface. The statutory right to break the surface and obligation to compensate existed, and there was nothing in the language of the grant or nature of the subject to qualify the use of the word "minerals."

As a contrast I may mention the case of *Darvill* v. *Roper* (2), where on the construction of an agreement for a partition and deeds carrying it out, "minerals" were held not to include "stone quarries."

The law is very clearly stated by Montague Smith, J., giving the judgment of the Judicial Committee in *Attorney-General for the Isle of Man* v. *Mylchreest* (3), where he says: "It was contended for the Crown that the word 'minerals' used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shown by any of the above-mentioned modes of explanation that in the particular instrument to be construed, it was employed in this narrower sense." And he points out that no qualifying circumstances existed in *Hext* v. *Gill* (4).

There is a long series of cases, of which *The Lord Provost of Glasgow* v. *Farie* (5) is the most notable, in which the question arose on the construction and application of the provisions of the Lands Clauses Acts to rights of minerals as between the vendor of

(1) 25 L. R. Ir. 483.
(2) 3 Drew. 294.
(3) 4 A. C. 294, at p. 305.
(4) L. R. 7 Ch. App. 699.
(5) 13 A. C. 657.

lands and railway companies. I am not at all sure when we add in Ireland the statutory rights and obligations created by the 10 Geo. I., c. 5, that there is any material difference between the rules applicable to the statutory reservations created by the Railways Acts and the case of an ordinary grant reserving minerals; and in my opinion the cases of *Hext* v. *Gill* (1), *Jersey* v. *Guardians of The Neath Poor Law Union* (2), *Great Western Railway Co.* v. *Blades* (3), and *Todd* v. *North-Eastern Railway Co.* (4), require to be read and considered together for the purpose of ascertaining the true rule of law, and applying it to the facts of the present case.

In *Hext* v. *Gill* (1) the lord of a manor granted freeholds to a copyholder, reserving all mines and minerals, in words almost the same as in the present case. The subject in controversy was china clay, the nature and making of which are elaborately described. Mellish, L.J., lays down that rule so often quoted, "a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning"; and he adds: "The surface and all profit that can be got from cultivating the surface, or building on it, or using the surface, is intended to be conveyed, but the right to everything under the surface, and to all profit that can be got from digging anything out from under it, is intended to be reserved." I pass over the actual result of that case, which would have been different in this country.

In *Jersey* v. *Guardians of Poor of Neath Union* (2) there was a conveyance in fee with a reservation of mines and minerals of a very wide kind, with specified limitations as to disturbing the surface. The subject was a bed of brickearth and clay underlying the land. The case seems a plain one, but it is valuable for the observations of Bowen, L.J., who adopts *Hext* v. *Gill* (1) as a sound rule of construction, unless there is something in the context or nature of the transaction to alter it. He says: "The object of a reservation of that sort must be the severing of some-

(1) L. R. 7 Ch. App. 699.
(2) 22 Q. B. D. 555.
(3) [1901] 2 Ch. 624.
(4) [1903] 1 K. B. 603.

Appeal. 1908.

STAPLES v. YOUNG.

The Lord Chancellor.

thing from the land and the use of it afterwards for purposes distinct from those for which the rest of the land is used. The object is to treat differently from the rest of the land with respect to its enjoyment certain constituent parts of the earth which have a use and value of their own independent of their being constituents of the soil." The Lord Justice, in his usual clear and felicitous language, lays down a rule which he applies to the case before him.

Two of the most recent cases are *Great Western Railway Co.* v. *Blades* (1) and *Todd* v. *North-Eastern Railway Co.* (2) The facts in *Great Western Railway Co.* v. *Blades* (1) are stated at pages 624, 625—[His Lordship read them]. At p. 632 Buckley, L.J., points out that in cases dependent upon the operation of the Railways Act different considerations apply from those which arise in a case where the relations between the parties exist by contract or grant. I rather think the difference does not exist in Ireland where the statute 10 Geo. I., c. 5, comes in. Then, at p. 636, after referring to *Hext* v. *Gill* (3) and *Jersey* v. *Neath Guardians* (4), he says:— "The judgments in that case show me, as I think, that the true principle to apply is that, accepting the decision in *Hext* v. *Gill* (3) as being good law, and assuming that a mineral *prima facie* includes anything lying in the land which has a value of its own as being capable of being used independently of the land, yet that rule must bend, as Bowen, L.J., said (22 Q.B.D. 562), or may be modified, as Fry, L.J., said (*ibid.* 565), by the circumstances of the case, and that what I must look to is to see whether in the nature of this transaction, and having regard to all the circumstances of this case, the word "minerals" does in the case now before me extend to include the clay in question." And he goes on (p. 637): "It seems to me that I must ascertain the meaning upon the footing that 'mineral' may, as in *Hext* v. *Gill* (3) and in *Midland Railway Co.* v. *Haunchwood Brick and Tile Co.* (5), include clay, but not that it must include clay, and that the question whether it does or does not is to be determined by ascertaining the true nature of the transaction and the object of the contracting parties. This, I think, is the fair result of *The Lord Provost of*

(1) [1901] 2 Ch. 624.
(2) [1903] 1 K. B. 603.
(3) L. R. 7 Ch. App. 699.
(4) 22 Q. B. D. 555.
(5) 20 Ch. D. 552.

Glasgow v. *Farie* (1) and *Earl of Jersey* v. *Neath Poor Law Union* (2). Mines and minerals, as Lord Watson says (13 App. Cas. 675), are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used." Then, at p. 638, he comes to apply the law to the facts—"It remains to solve the question, therefore, upon the facts of this particular case. Now the facts here, concisely stated, seem to me to be that this clay is the soil. The 6 inches of decomposed vegetable matter on the surface is not in this place the soil any more than in a room the carpet can be said to be the floor"; and later on: "It is impossible to read the speeches in *The Lord Provost of Glasgow* v. *Farie* (1) without seeing that it may well be, consistently with that decision, that the same clay may, within that decision, be a mineral in one district and not in another. Thus, Lord Watson (13 App. Cas. 679), after suggesting that it may be possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but be reserved if they occurred some depth below it, goes on to say that the expression 'the land' being that which the company purchases, cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes and must be held to include the upper soil, including the subsoil, whether it be clay, sand, or gravel. And Lord Macnaghten (*ibid.* 698) points to similar considerations as affording an answer to the question what it is that the company have bought. Where the clay is what Lord Halsbury calls the stratum on which the house is built (p. 669), or constitutes the 'land,' as Lord Watson describes it (p. 679), it is not, I think, a 'mineral' within the Act as the Act has been construed by the decisions. It is a thing which has a value of its own, but not a thing which has a value of its own apart from the soil in which it is found, for the simple reason that it is itself the soil."

A later case still is *Todd's case* (3). The facts were as stated by an arbitrator:—"All the land the subject of the arbitration contains immediately under the surface or vegetable soil an extensive bed of clay or common brickearth. This extends to a considerable depth. It has been proved by boring to extend to a depth of 100 feet. Clay of the same character exists immediately

(1) 13 App. Cas. 657. (2) 22 Q. B. D. 555. (3) [1903] 1 K. B. 603.

Appeal. 1908.

STAPLES v. YOUNG.

The Lord Chancellor.

under the surface over a large area of land in the district. The clay is worked by open work, and not by mining."

Lord Halsbury adheres to everything he had said as regards *Hext* v. *Gill* (1), and he treats *Lord Provost of Glasgow* v. *Farie* (2) as governing the case, and there decided that common clay forming the surface or sub-soil of land was not reserved under the Railway Acts. The value of the case is that the Court of Appeal adopted the judgment of Buckley, L.J., in *Great Western Railway Co.* v. *Blades* (3).

I think, then, we have to deal with the facts of the particular case before us. It is an ordinary agricultural holding, let for agricultural purposes. It is capable of being tilled, and in ordinary course is tilled, and produces oats and potatoes, and grows grass. For the first 10 inches or so there is a sandy soil, in which sand forms about five-sixths of the surface, and the rest is vegetable matter, and this surface-soil, or sandy loam, is capable of producing crops, and it is top-dressed (the tenant says) every year. As you go down one finds the sand in larger proportions, until after going down about 15 feet you arrive at sand unmixed with vegetable matter which can be used for building purposes, and so the top layer, if the sand be separated from the earth by washing, could be used for commercial purposes; but, taken as a whole, the subject demised—the soil—is so impregnated with sand that it can only be described as a sandy loam, capable of cultivation by top-dressing, and then yielding such crops as thrive best in an admixture of sand and vegetable matter. It cannot be predicated of any part of it that if you extracted the sand by washing or other process there would be anything left to form a real subject of demise for agricultural purposes. The sand and vegetable matter are themselves the soil; and if this be true, as I think it is, to the depth of some 15 inches, I do not think the case is altered by finding lower down sand unmixed with earth. I think it is still, as a whole, the soil demised, and if the sand is excepted, there would have been nothing left for the grant to operate on as a real subject of demise, especially at the date of the grant.

I think the real object of the parties to the letting is better

(1) L. R. 7 Ch. App. 699. (2) 13 App. Cas. 657. (3) [1901] 2 Ch. 624.

served by a decision that the sand found in this holding is not a "mineral" within the meaning of the decision in *Hext* v. *Gill* (1), or *Fishbourne* v. *Hamilton* (2). While admitting, therefore, that under some circumstances "sand" may be a "mineral" within a reservation of mines and minerals, I am of opinion that we should be going further than any decided case if we were to come to such a conclusion in the present instance. I think that the appeal should be allowed, and the action dismissed.

FITZGIBBON, L.J. :—

It may not be necessary to show the ground of our decision on the face of our order, but it appears to me that it might be stated in these words :—"It appearing to the Court that the sand on the holding in the pleadings mentioned was not included in the grant of the mines and minerals in the deed-poll of the 26th April, 1864," this action must be dismissed.

The question is really one of fact, namely, what was the subject-matter which was reserved or passed under the designation of "mines and minerals" by the instrument in question. In determining that question, among other circumstances, evidence of the nature and character of the land at the time is admissible, and is persuasive.

We are dealing with a case in which whatever is not in the grant must be in the reservation, and whatever is not in the reservation must be in the grant. "Surface" has been used as a generic word to describe what is not "mines and minerals." It is not a strict definition, because the surface itself may, in some places, be the out-crop of minerals ; but, for the present purpose, "surface" describes intelligibly, though not strictly, what is not mines and minerals.

"Minerals," in its widest possible meaning, includes everything capable of being dug out and taken away, having a specific character and value, and being won by mining.

Confining my opinion strictly to the 3½ Irish acres held by the defendant, I hold, on the evidence, that if the sand which he has been taking away is not his property, but is reserved as "mines

(1) L. R. 7 Ch. App. 699. (2) 25 L. R. Ir. 483.

Appeal. 1908.

STAPLES v. YOUNG.

Fitz Gibbon, L.J.

and minerals," nothing will be left to him as the occupier and owner of the lands except the "vesture" of the land. The only "surface" which is not sand is the growing vesture and the residue of decomposed vegetable matter, mixed with sand, left over from other years. "*Humus*" is, I think, good Latin for that, and it is not co-extensive with *solum*. If the owner of the reservation, who must be the owner if the defendant is not, were to carry away all the sand, he would leave nothing except the *debris* of grass or herbage, either growing at the time, or decaying from previous years. We must find strong circumstances to justify a construction which would bring about that effect, as against one which would give the owner of the land a farm of sandy soil, and leave the local coal to the owner of the reservation. The case may be tested by reversing the conveyancing, and considering the effect of a grant by the owner in fee of the mines and minerals, and a subsequent grant or demise of the lands subject to the previous grant. If the grantee of the mines and minerals could not cart away all the sand—practically the whole place—what was he to leave behind? Unless he could take all the sand, there is no evidence that, if he went down to any depth at any place on the defendant's holding, he would come upon anything except a continuation of the same sand which formed the surface, and which was five-sixths of even the *humus* on the top.

In short, I find on the evidence that the sand on the defendant's land is "*soil*" or "clay," and is not "*mineral*" in its character, either as soil or as clay. So far as legal considerations are concerned, I respectfully adopt and follow, in reasoning and language, the judgment of Mr. Justice Buckley in *Great Western Railway Co.* v. *Blades* (1).

HOLMES, L.J. :—

The only question discussed on the hearing of this appeal is whether all mines and minerals to be had or found in and upon the lands of Derry and Brackaville, in county Tyrone, to which the plaintiff and Lord Charlemont are entitled in equal shares, include sand in a small holding in Brackaville, in the tenancy of the defendant. The title of the plaintiff to an undivided moiety

(1) [1901] 2 Ch. 624.

of the mines and minerals as above described is beyond dispute. In the time of Charles I., in 1632, Sir Andrew Stewart, being seised in fee-simple of the lands of Derry and Brackaville, granted to John Nicholson, his heirs, and assigns, the said lands, excepting to himself, his heirs and assigns, the use and benefit of all mines and minerals that could or might be had or found therein and thereon, and reserving the annual fee-farm rent of four pounds.

This grant was confirmed by a deed of the 19th June, 1672, whereby the same lands were conveyed to William Nicholson, his heirs, and assigns, with the same exception and reservation; and by deed-poll, of the 26th April, 1864, James Hargreave, one of the Judges of the Landed Estates Court, granted to Sir Thomas Staples, grand-uncle of the plaintiff, and James Alfred Caulfield, now Lord Charlemont, their heirs, and assigns, the fee-farm rent of £4 late Irish currency reserved by the indentures already abstracted, and also the use and benefit of the mines and minerals therein and thereby excepted, subject to a lease to which I shall presently refer. This deed is not now forthcoming; but, in accordance with the practice of the Landed Estates Court, the memorial lodged in the Registry of Deeds office is a duplicate of the original executed by Judge Hargreave, the grantor in the original deed, and was properly received in evidence by Mr. Justice Ross. We have thus a perfect title shown to the excepted mines and minerals. The lands of Derry contain over 260 acres, and the lands of Brackaville 225. It is proved that there are large quantities of coal and fire-clay to be found in them. The district abounds in these minerals, which have given the name of Coalisland to the nearest town; and it appears from the Landed Estates Court conveyance that the minerals granted thereby were subject to a lease of the coal-seams to Robert King, for the term of his life, or twenty-one years, at the annual rent of £100. This lease included some coal-mines in other lands; but those in Derry and Brackaville formed a substantial portion of the demise. I find in Lewis's Topographical Index that the area of the coal-fields of which Coalisland is the centre is six miles in length by two in breadth; and that so far back as the year 1744 a canal was constructed from Lough Neagh to that town, for the purpose of carrying and distributing the minerals found in the district. It may I think therefore be

Appeal. 1908.

STAPLES v. YOUNG.

Holmes, L.J.

assumed that for at least 160 years, and probably for a longer period, the mines and minerals excepted from the grant of Derry and Brackaville have been known to be of considerable value, and that the persons who became successively entitled thereto have turned them to profitable account. If this be so, it is worthy of note in considering the question raised in this appeal, that as far as can be gathered from the evidence down to the year 1904, no owner of the minerals made any claim to sand, or sought to prevent the occupiers of the lands from using it. If the premises were situated in England, this might be accounted for by the fact that the terms of the exception do not confer a right to enter the lands and raise or dig for minerals. But in Ireland, from the reign of George I., statutes have been in existence, ending with 23 & 24 Vict. c. 154, section 32, which is still in force, giving the mine-owner the right above mentioned on his making to the tenant compensation for the damage arising from the exercise thereof. Furthermore, the absence of a claim to dig for and take sand has not arisen from there being any difficulty in getting sand on the lands.

The holding of the defendant is a small one of about five acres; but as proved by Mr. O'Neill, called for the plaintiff, as well as by one or two of the defendant's witnesses, the soil of the defendant's land is the same as the other land in Brackaville, and the result of the evidence is that everything under a top layer of soil 8 or 10 inches thick is sand to the depth of many feet. This sand differs in colour at different depths; but, as far as I can gather, it is nothing more than sand in any place. It also appears that five-sixths of the top layer consist of pure sand, and that the greater part of the remaining sixth is vegetable matter, such, I presume, as would be found in any soil as the result of the use of manure and regular cultivation.

It is, I think, the reasonable inference from this evidence that at the date of the grant of 1632 the lands of Brackaville from the surface to the depth of 18 or 20 feet consisted of nothing but sand, and that if sand were included in the exception there would be nothing for the grant to operate on. This accounts, on the one hand, for the almost nominal rent reserved—less than 2*d.* the Irish acre; and, on the other hand, for the fact that during

270 years no one thought of claiming sand under the exception contained in the grant.

This action arose from the following circumstances. A tenant of the lands of Brackaville, called O'Farrell, was found in the year 1904 to be digging and selling the sand on his holding, and he was called on by the plaintiff's agent to pay a royalty of 3*d.* per load therefor. This was the first demand of this kind ever made; and, with a meekness unusual in an Irish tenant, he paid the sum asked for during thirty-two months. He then declined to pay any more. The defendant swore that he had been taking sand from his holding since he bought it nineteen or twenty years ago. I gather that no claim was made against him for so doing until O'Farrell agreed to pay a royalty; but when this was demanded in his case, he declined to give it, and the present action followed. Another witness called Patterson swore that on his holding, adjoining the defendant's, he began to excavate the sand in 1874, selling it to anyone who would buy it, and that no claim was made against him for so doing. The evidence given on behalf of the defendant as to the character of the soil is much more satisfactory than that of the plaintiff; and leads me to the inference that even now the soil consists almost wholly of sand, and that in the time of Charles I. it was altogether so.

I come now to ascertain and apply the law to this state of facts. There is no matter of legal controversy as to which it is more easy to find judicial decisions than the question of what is comprised in the term "mineral," and, I may add, as to which the decisions give so little real guidance. For some time it was thought that a solution of the difficulty was supplied by the words of Mellish, L.J., in *Hext* v. *Gill* (1), that "a reservation of minerals includes any substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." This decision was accepted in this Court in *Fishbourne* v. *Hamilton* (2), but I think that Lord Halsbury by his observations in *Todd and The North-Eastern Railway Company* (3) has left no doubt that it was

(1) L. R. 7 Ch. App. 699. (2) 25 L. R. Ir. 483. (3) [1903] 1 K. B. 603.

Appeal. 1908. STAPLES v. YOUNG. Holmes, L.J.

disapproved of by the majority of the House of Lords in *The Provost of Glasgow* v. *Farie* (1). In truth, any attempt to lay down, in a sentence, a rule of general application to a subject-matter which in its nature is diversified and multiform can never be completely satisfactory. The formula is likely to include what ought to be excluded, and to exclude what ought to be included. Moreover, a qualification making a rule to depend upon the nature of the transaction is so far-reaching as to deprive the rule of much value as a general guide.

It is strange that, numerous as are the reported decisions relating to minerals, I have been able to find only one that mentions sand, and in it the reference is only incidental. In *Tucker* v. *Linger* (2), where the agreement used the words "mines and minerals, sand, quarries of stone, brickearth, and gravel pits," Jessel, M.R., observed that no satisfactory reason could be given for the insertion of these latter words except that the parties were not very clear about the meaning of the word "minerals," adding afterwards that sand is certainly a mineral when it is worked at a profit and got by digging beneath the surface. I agree that sand may often be comprised in an exception of minerals; but we must have regard to what Mellish, L.J., calls the nature of the transaction; and while sand may be a mineral in one place, it may not be in another. In *The Provost of Glasgow* v. *Farie* (1) Lord Halsbury quoted with approval portion of the judgment of Lord MacLaren, in which he says: "Here the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself, Did anyone who wanted to purchase or acquire a clay-field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals." In the case now under consideration, not only the subsoil of the lands of Brackaville, but also the greater part of the surface, consists of sand; and if sand be excepted

(1) 13 A. C. 657. (2) 21 Ch. D. 18.

from the grant, it is difficult to understand what passed to the grantees.

In *The Great Western Railway Co.* v. *Blades* (1) Buckley, J., stated concisely the facts in the following words, "This clay"—that is, what was claimed as a mineral—"is the soil. The six inches or so of decomposed vegetable matter on the surface is not in this place the soil any more than in a room the carpet can be said to be the floor." So I say here that the soil cannot be confined to the very small portion thereof that is not sand. Both the surface of the lands of Brackaville and the soil for a considerable depth below the surface consist substantially of sand; and if I were to hold that sand is included in the excepted minerals, I should leave no subject-matter for the operation of the grant. For these reasons I am of opinion that the appeal ought to be allowed.

Solicitors for the plaintiff: *French & French.*
Solicitors for the defendant: *Brown & M'Cann.*

R. ST. J. C.

M'HUGH *v.* M'HUGH.

(1907. No. 506.)

Will—Construction—Legatees—"Nieces and nephews"—Misdescription—Uncertainty.

A testatrix by her will bequeathed certain stocks and shares to her "nieces and nephews," coupled with the following directions:—"None of them to be sold, but the father's and mother's name to be put in instead of mine, and they to receive the interest for them until they are twenty-one years old." After giving a legacy for masses and another pecuniary legacy, testatrix concluded her will as follows:—"If my husband should require money, he can get some of the interest of what is left to the children, the remainder to go for their keep." At the date of the will all the children of testatrix's brothers and sisters were of age, and none of them had both father and mother living. Several grandchildren, with their father and mother, lived with testatrix, and evidence was offered that she used to refer to them as "the little children," and expressed an intention to benefit them:—

(1) [1901] 2 Ch. 624.

Barton, J.
1907.

M'HUGH
v.
M'HUGH.

Held, that there were sufficient materials in the will, with the help of admissible explanatory evidence, to show that the testatrix, in making a bequest to her "nieces and nephews," did not refer to the children of her brothers and sisters, but that there were not sufficient materials of a legal and admissible kind to enable the Court to determine definitely the objects of the bequest, and that consequently it was void for uncertainty.

ORIGINATING SUMMONS.

By her will, dated 29th August, 1906, Fanny M'Hugh, of Corbally, in the Queen's County, disposed of her property in the following terms :—"I give to my nieces and nephews what shares I hold in the National Bank, Guinness's Brewery, Great Southern Western Railway, The Dublin, Wicklow, and Wexford or whatever name it will in future be known by; none of them to be sold, but their father's and mother's names to be put in instead of mine, and they to receive the interest for them until they are twenty-one years old. Whatever money comes from San Francisco and Saint Yosse, £10 to be given for Masses for them and all the souls in purgatory, father, mother, brothers, and sisters, to be said in public, half to the parish priest and the other half to the curate. When the money comes from California, £100 to be given to Vincent O'Connor. If my husband should require money, he can get some of the interest of what is left to the children, the remainder to go for their keep."

Letters of administration were granted to John M'Hugh, plaintiff herein, and only child of testatrix on 13th April, 1907.

At the time of her death the testatrix was living at Corbally on a farm the property of her husband, one of the defendants herein, Michael M'Hugh. Her son, the plaintiff, and his wife and five children also lived with testatrix. These children were aged five years, four years, three years, two years, and one year, respectively. Affidavits were offered in evidence, which contained statements to the effect that testatrix used to refer to the grandchildren as "the little children," and expressed an intention of benefiting them. The testatrix had a large number of nephews and nieces, children of brothers and sisters, the youngest of whom, Nicholas Vincent O'Connor, was at the date of the will twenty-six years of age. The parents of those nephews and nieces were all dead at the date of the will except one sister of the testatrix.

The present summons was taken out by the plaintiff to have the question determined whether upon the true construction of the will the testatrix intended the children of her brothers and sisters to take under the will, or the grandchildren, or whether there was an intestacy on the ground of uncertainty.

Ignatius O'Brien, K.C., and *James O'Connor*, for the plaintiff:—

The conditions in the will itself are three in number. There are to be "nieces and nephews" who are to be under twenty-one, have fathers and mothers alive, and satisfy the description of "children." The nieces and nephews of testatrix being all grown-up at the date of the will, and not having both parents alive, do not satisfy the requirements of the will, and consequently there is a latent ambiguity. Therefore it is open to us by reference to the state of the family and the surrounding circumstances to show what the testator intended. The grandchildren resided with testatrix, and "children" is a word commonly used to denote children living in the house. This is a case of misdescription of legatees, and evidence to rectify the misdescription is admissible: *White* v. *Scoles* (1); *Kilvert's Trusts* (2); *Baxter* v. *Morgan* (3). The requirements of the will itself and the surrounding circumstances show that the testatrix did not intend her nieces and nephews to take, and she must have intended to leave the property to her grandchildren, whom she expressed an intention of benefiting. Otherwise there must be an intestacy.

Herbert Wilson, K.C., and *Harbinson*, for the defendants:—

The only mistake the testatrix has made is in reference to the age of the nieces and nephews; otherwise there is nothing in the will inconsistent with the nieces and nephews being the persons contemplated by the testatrix. A mere misdescription of this kind cannot affect the construction of the will, which is otherwise quite clear: *Higgins* v. *Dawson* (4); *Inderwick* v. *Tatehell* (5); *Flood* v. *Flood* (6). Expressions in a will must be construed, and

(1) 80 L. T. (N. S.) 701.
(2) L. R. 12 Eq. 183.
(3) 7 L. R. Ir. 501.
(4) [1902] A. C. 1.
(5) [1903] A. C. 120.
(6) [1902] 1 I. R. 538.

Barton, J. 1907.

M'Hugh v. M'Hugh.

Nov. 15.

the expression "nieces and nephews" is capable of only one construction.

Barton, J. :—

If the words "my nieces and nephews" constituted the only description, to be found in this will, of the objects of this gift, the case would be free from doubt. The words would be construed in their primary sense, as meaning "children of testatrix's brothers and sisters"; and, as there is a class of persons answering to that description, there would be no room for further argument or evidence. Extrinsic evidence is always admissible to show who are the persons and what are the properties mentioned in a will, in the same way as the parties and parcels in a deed may be identified by evidence. But when it has once been proved that, among the persons who are shown to have been known to the testator, there are persons who completely satisfy all the descriptive words in the will, understood in their ordinary and primary sense, extrinsic evidence is not admissible to show that it is improbable that they were intended, or that it is more probable that some other class of persons was intended.

But the words "my nieces and nephews" are not the only words to be found in this will which are descriptive of the objects of this gift. The description of objects may be, and should be, collected from the whole will. In the present will the testatrix directed the stocks and shares, which she bequeathed to her nieces and nephews, "not to be sold, but their father's and mother's names to be put in instead of mine, and they to receive the interest for them until they are twenty-one years old." She also makes provision for her husband by providing: "If my husband should require money, he can get some of the interest of what is left to the children, the remainder to go for their keep." The testatrix evidently knew the objects of her bounty, and describes them by these references as a class of persons who were or who included children under twenty-one, and also as a class of persons who had both parents living. These specific references in the will to the takers of this bequest are as much descriptive of them as the words "my nieces and nephews"; and extrinsic evidence is admissible to show that, although the children of testatrix's brothers

and sisters answer to the description "nieces and nephews," they do not answer to the whole description in the will. It appears from extrinsic evidence that all the children of testatrix's brothers and sisters were at the date of the will considerably over twenty-one years; that all her brothers and all her sisters save one were dead; and that none of their children had a father, still less both a father and a mother, living. Whoever were the objects of this gift, it is, I think, clear from the language of the will, interpreted by admissible evidence, that those objects were not the testatrix's nieces and nephews understood in the primary sense of those words.

There remains the further question—whether we have sufficient materials in the will, when explained by admissible evidence, to show who were the objects of the gift. There have been cases where the words "nephews" and "nieces" have been held to mean "nephews and nieces by affinity" or "grand-nephews and grand-nieces." In fact, these are recognized secondary meanings of the words. But there is nothing in the will to point to such persons. The Court is not informed whether there are any such persons or not; at all events, no evidence has been offered of the existence of any such persons answering to the description in the will. But evidence has been offered that there were some children, grandsons and granddaughters of testatrix, living in the house with her, and that their father and mother were also living with her. This evidence was admissible, but was insufficient, in my opinion, for the purpose for which it was offered. Evidence was also offered that the testatrix used to speak of them as "the little children." It is not necessary to consider whether that piece of evidence is admissible, because its weight, even if admissible, is of the slightest possible description. Other evidence has been offered, which is clearly inadmissible, of testatrix's declarations in her lifetime of testamentary intentions in favour of these children.

There are not, in my opinion, sufficient materials to enable me to hold that testatrix's grandchildren were the takers under this gift. It is true that they answer to certain descriptive references in the will; but they do not answer to the whole description. They are not "nieces and nephews" within either the primary

Barton, J. 1907.

M'Hugh v. M'Hugh.

or secondary meaning of those words. The dictionaries include grandchildren among the obsolete meanings of the words "nieces" and "nephews," and quote passages from Chaucer, Spenser, and Shakespeare, in which the words were used in that sense. But I doubt whether it can be regarded as having been an ordinary meaning of the words since, at all events, the close of the seventeenth century. In the absence of any context or admissible evidence from which a different meaning can be gathered, the Court is bound to construe these words in the ordinary sense in which they were used by ordinary men and women in the age in which the testatrix lived and moved, and not according to any archaic or obsolete meaning which may have formerly been applicable to them. There is, in this case, no context and no admissible evidence that would justify the Court in holding that the testatrix used these words in the obsolete sense of grandchildren.

Under these circumstances the Court is driven to hold the gift void for uncertainty. That is an unsatisfactory conclusion to which the Court will never willingly be led. But in the present case I see no escape from it. We have enough in this will to make it clear, with the help of admissible explanatory evidence, that the testatrix did not refer to the children of her brothers and sisters; but we have not sufficient materials of a legal and admissible kind to enable us to say with sufficient certainty who were the objects of this bequest.

Solicitor for the plaintiffs: *P. J. Byrne.*
Solicitors for the defendants: *O'Meagher & Son.*

J. MAC M.

IN RE MARIA IRWIN WEIR'S ESTATE.

Wylie, J.
1907.
June 21, 25.
July 5.

Appeal.
1908.
Jan. 23.

Landlord and tenant—Land purchase—Agreement as to price—Sale within zones—Separate estate—Declaration—Jurisdiction of Estates Commissioners—Arrears of rent—Irish Land Law Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98.

An originating application for the sale of an estate comprising sixty holdings, fifty-six of which were subject to judicial rents, was lodged on the 20th December, 1904, and filed on the 3rd March, 1905. In the case of each judicial tenant the purchase-money was within the zones. On the 1st June, 1905, the following Provisional Declaration was made by the Estates Commissioners: "Subject to the result of such further inquiries as may be made, the lands . . . may be regarded as an estate." On the 1st of February, 1907, the Estates Commissioners required a statement showing the rent paid by each of the tenants during the five years prior to the sale. This was refused in the cases of the judicial tenancies on the ground that the Commissioners had no power to investigate the security. The Commissioners insisted on an answer to their requisition; and the following questions of law were accordingly submitted to the Judicial Commissioner:—

Had the Estates Commissioners jurisdiction—(1) to require, in the case of the judicial tenants, a statement showing the rents paid by each during the previous five years; (2) to consider at all applications for advances before a declaration under section 98 (1) of the Irish Land Act, 1903, had been made; (3) to take any definite step with regard to the sale before making that declaration; (4) to issue the Provisional Certificate? and whether they had power to postpone the exercise of their discretion as to issuing a final declaration or certificate under section 98 (1) until the day upon which the holdings were to be vested in the purchasers?

Held, by Wylie, J., that the Provisional Declaration was not such a declaration as was contemplated by section 98 (1), and was merely an indication to the vendor at an early stage that such a declaration would probably be made.

Taking this view of the Provisional Declaration, and following the decision of Meredith, M.R., in *In re Scottish Union and National Companies Estate* ([1906] 1 I. R. 42), Wylie, J., answered (1) in the affirmative. As to (4), where all due inquiries have been made and everything arranged to enable a sale to be carried out, there is nothing to prevent steps, dependent on the declaration, being taken on the same day in their proper order.

Wylie, J., held that (2) and (3) did not arise on the facts stated in the Memorandum on which the questions were based.

Wylie, J.
1907.

In re
WEIR'S
ESTATE.

Held, by the Court of Appeal, it being admitted that the requisition referred to in (1) was for the purpose of considering whether the judicial holdings were sufficient security for the advances applied for, that the following answers should be given:

(1) and (4) in the negative; (2) in the affirmative, save so far as the consideration of the application for advances was for the purpose of ascertaining whether the judicial holdings were sufficient or adequate security for the advances applied for; and (3) in the negative, save so far as regards any definite step which the Estates Commissioners may consider it material and necessary to take with a view to making the declaration.

THE originating application in this matter, which was for the sale of the entire of the vendors' estate (consisting of sixty-one holdings, fifty-six of which were judicial holdings and the remaining five non-judicial) under the Irish Land Act, 1903, was lodged in the office of the Estates Commissioners on the 20th December, 1904, and was accompanied by the map, schedule of areas, schedule of tenancies, certificate of Poor Law Valuation, and surveyor's affidavit as required by the Rules.

Sixty of the purchase agreements were lodged on the 14th January, 1905, and the remaining one was lodged on the 24th January, 1905. The originating application was filed on the 3rd March, 1905. On the 1st June, 1905, the lands comprised in the first schedule to the originating application were provisionally declared to be an estate in the following form:—"Subject to the result of such further inquiries as may be made, the lands referred to in paragraph 4 within may be regarded as an estate." All the judicial tenants' agreements were at prices within the zones.

On the 28th February, 1906, the abstract of title was lodged. On the 22nd January, 1907, the Examiner's rulings on title were issued.

It is not the practice of the Estates Commissioners to make a final declaration under section 98 (1) of the Irish Land Act, 1903, until the same day as, and simultaneously with, the certificate under section 17 (1) of the said Act, the vesting of the holdings in the tenant purchasers, the lodgment of the purchase-money in the Bank of Ireland, and the order attaching claims under section 24 (1) of the said Act.

On the 30th November, 1906, the Estates Commissioners sent a query to the vendors' solicitors, requiring them to furnish the Commissioners with the following information:—(1) a statement showing the amount of arrears which had been added to the purchase-money of each holding, and how such arrears had accrued; (2) a statement showing the rent paid by each tenant during the last five years.

On the 7th December, 1906, the vendors' solicitors replied, enclosing a complete copy of the purchase calculations, showing the arrears and how same were dealt with, and also a statement showing the rent paid by each non-judicial tenant during the five years to 1st May, 1904, and pointing out that the Court of Appeal, having held section 1 (1) of the said Act to be mandatory upon the Commissioners, the Commissioners had no jurisdiction, in the case of judicial tenants whose purchase annuities were within the zones, to inquire into the security for the amount of the advances. The letter further stated that the purchase agreements were based on a reduction of 6*s.* in the £ to first-term tenants, 4*s.* in the £ to second-term tenants, and 5*s.* in the £ to non-judicial tenants; and that as regarded the arrears, which were calculated to the 1st November, 1904, a half-year's rent was to be paid in cash on signing the purchase agreements, and one half of the balance was to be cancelled, and the other half added to the purchase-money.

[Further correspondence took place between the Estates Commissioners and the vendors' solicitors, and on the 25th January, 1907, the vendors' solicitors had an interview with Mr. Commissioner Bailey, when the Commissioner stated that the object of the query of the 30th November, 1906, was to ascertain the time at which the arrears accrued, as the Estates Commissioners were not prepared to advance public moneys to be applied in the discharge of irrecoverable arrears, nor to pay a bonus on such arrears. The vendors' solicitors then pointed out that the Court of Appeal was about to give judgment in the cases of J. D. Crosbie's Estate, Neilan and Crean, Tenants, on the following Monday; and that as its judgment might conclude the controversy in this

Wylie, J. 1907.

In re Weir's Estate.

case, it would be well to adjourn the discussion until after that day, to which course the Commissioner agreed.] (1)

On Monday, the 28th January, 1907, the Court of Appeal gave judgment in the cases of *Crosbie's Estate*, unanimously deciding that arrears of rent could be added to the purchase-money, and that if the purchase price, including arrears, was within the zones, the Estates Commissioners were bound to sanction the advance under section 1 (1) of the said Act, and were not entitled to go into the question of the security for such advance.

Accordingly, on the 29th January, 1907, the vendors' solicitors wrote to the Estates Commissioners that, having regard to the said decision, they assumed the Estates Commissioners would withdraw their query of the 30th November, 1906, and return the purchase calculations.

On the 1st February, 1907, the Estates Commissioners addressed the following query to vendors' solicitors:—"With reference to the arrears which, at the time the purchase agreements were signed, were due by the tenants, please state at what time they accrued. Please reply without delay."

[On the 4th February, 1907, the vendors' solicitors again interviewed Mr. Commissioner Bailey, who then explained that even in cases within the zones the Estates Commissioners claimed the power to investigate the security for the advance in every case, pending such time as they should make the final declaration under section 98 (1) of the said Act; or, in other words, that section 1 (1) of the said Act is not mandatory upon the Commissioners until they have made such declaration. The Commissioner further intimated that the Estates Commissioners would be glad to have the very important questions arising in the case judicially decided.] (1)

The vendors, therefore, requested that the Estates Commissioners would, pursuant to section 23 (1) of the said Act, refer for the decision of a Judicial Commissioner the questions of law arising from their query and practice aforesaid.

(1) The memorandum of the Estates Commissioners did not state the facts within brackets, which were given in evidence for the first time on the hearing of the appeal.

The amount of the purchase-money was £8051. On the 18th April, 1907, the Estates Commissioners intimated to the vendors their willingness to purchase the estate, under sect. 6 of the Land Act of 1903, if the vendors would accept £7100 as the price. This offer was refused by the vendors.

Some delay having taken place in settling the questions to be decided, the vendors applied to the King's Bench Division for a writ of mandamus to order the Estates Commissioners to settle the questions; and on the 10th May, 1907, the following questions were settled by the King's Bench Division for the decision of the Judicial Commissioner.

1. Whether the Estates Commissioners had jurisdiction to require the vendors to furnish, in the case of the fifty-six judicial tenants on this estate, a statement showing the rent paid by each tenant during the last five years, required by their requisition dated the 30th day of November, 1906?

2. Whether the Estates Commissioners had jurisdiction to consider at all the applications for advances on this estate before a declaration under sect. 98 (1) of the Irish Land Act, 1903, had been made by them?

3. Whether the Estates Commissioners had jurisdiction to take any definite step with regard to the sale of this estate under the said Act before making a declaration under sect. 98 (1) of the said Act that it was fit to be regarded as a separate "estate"?

4. Whether the Estates Commissioners had any jurisdiction under sect. 98 (1) of the said Act to issue the provisional certificate dated the 25th day of May, 1905, and whether they have power to postpone the exercise of their discretion as to the issuing of a final declaration or certificate under the said section until the day upon which the holdings are to be vested in the tenant purchasers?

The Right Hon. J. H. Campbell, K.C., and *Garrett Walker, K.C.*, for the vendor.

Serjeant O'Connor, K.C., and *Dudley White*, for the Treasury.

Ronan, K.C., and *De Renzy*, for the Irish Land Commission.

Wylie, J. 1907. *In re* WEEB'S ESTATE. July 5.

WYLIE, J. (after stating the facts as set out in the memorandum of the Estates Commissioners, which did not contain the statements above enclosed in brackets, proceeded) :—

Now, I wish to say, at the outset, before dealing with these questions, that only two of them, viz., the first and fourth, appear to me to arise in a concrete form upon the memorandum of facts. The second and third questions, which I will deal with first, seem to me to be general and hypothetical.

The second question asks, whether the Estates Commissioners had jurisdiction to consider at all the applications for advances before making the declaration under sect. 98, sub-sect. 1 ? Now, there is not a statement or a suggestion in the memorandum, from beginning to end, that the Commissioners have, in this case, up to the present time, considered at all the applications for advances. As far as appears in the memorandum the only act of the Commissioners objected to, in the course of the proceedings, was their requiring, on the 30th November, 1906, a statement, showing the rent paid by each tenant during the last five years, or, as it was subsequently varied, a statement at what time the arrears, which were shown to be due at the date of the purchase agreements, had accrued. I am not told for what purpose or with what intention these statements were required ; but they seem to me to have no necessary connexion whatever with the applications for advances, or the prices at which the tenants had agreed to purchase, and to be such as might naturally and properly have been asked for, in this case, if no applications for advances had been lodged or purchase agreements entered into. I do not, therefore, understand the meaning of question 2, as applied to the facts stated in the memorandum ; and, in its general and hypothetical form, I must decline to answer it, except so far as it is dealt with in answering question No. 4.

Question No. 3 seems to me to have the same fault. It asks, whether the Estates Commissioners had jurisdiction to take any definitive steps with regard to the sale of this estate before making the declaration under sect. 98, sub-sect 1 ? Now, I asked counsel for the vendors, more than once, what they meant by " definitive steps," and what definitive steps the Commissioners had taken in this case ; and the only answer I could get was, that they had inquired

into the vendors' title, and into the security for the advances. Of course we all know the source from which this question is taken. It is copied almost *verbatim* from the judgment of my learned predecessor in the *Scottish Union Case* (1), and his answer to it was in the negative. As I understand his judgment, my answer would be the same. But this only shows the danger of deciding abstract and hypothetical questions without reference to a concrete case. No explanation is given by the learned Judge, in that case, as to what he meant by "definitive" step; but I notice that, in the report, the word is printed in italics, and I know that he always selected his words with great care and deliberation, and it is plain from the facts of that case that, in his view, a step which merely involved, or extended to, *inquiry* on any branch of the case, would not be a "definitive" step within the meaning of his judgment. Such being my view also, it is, in my opinion, clear that no "definitive" step with regard to the sale has yet been taken by the Commissioners in this case, and, therefore, the third question, in the form in which it is put, is an abstract question which, with all respect to the distinguished counsel who pressed it upon me, I decline to answer, save so far as my answer to question 4 may cover it.

As to the first and fourth questions, which do arise in a concrete form, I think it will be more convenient to deal with the fourth question first. It asks, whether the Estates Commissioners had jurisdiction, under section 98, sub-sect. 1, to issue the Provisional Certificate of the 25th May, 1905? It was suggested in argument that they had adopted this procedure in order to give them a jurisdiction, which they would not otherwise have, to make certain inquiries as to security, and to enable them to bring a certain pressure upon landlords to reduce prices. Now, at an early stage of the arguments, I ventured to express my view that this Provisional Declaration was not such a declaration under sect. 98, sub-sect. 1, as would bring the other sections of the Act which were dependent upon it into operation, or give the Commissioners any jurisdiction under the Act, which, without it, they could not exercise; and, in my opinion, it is of no value

(1) [1906] 1 I. R. 46.

Wylie, J. 1907.

In re Weir's Estate.

for any purpose, except as an indication to vendors at an early stage that the required declaration would likely be made.

I understand that it was for that purpose only that, at the request of the vendors, the procedure by Provisional Declaration was adopted. Be that, however, as it may, the Commissioners have, in my opinion, the same power to make it that they would have to give a written notice to vendors to the like effect, and it can have no other operation.

Question 4 also asks, whether the Commissioners have power to postpone the exercise of their discretion as to issuing a final declaration under sect. 98, sub-sect. 1, until the day upon which the holdings are vested in the tenant purchasers? Now, there is neither in the Act nor Rules any prescribed limit of time within which the declaration under sect. 98, sub-sect. 1, must be made; but there are many steps in carrying out a sale under the Act which are, by the Act, made dependent on the declaration, and none of those steps, which I think may be very well described as *definitive* steps, can be taken until *after* the declaration is made, whether it be on the same day or on any earlier day. For example, they cannot sanction an advance, or vest the holdings, or lodge the purchase-money, or attach claims to it, or pay a bonus, or purchase land other than untenanted land, until *after* the declaration is made. But where all due inquiries have been made and everything has been arranged to enable the sale to be carried out, I cannot find anything in the Act or Rules to prevent the Commissioners from taking all these steps in their proper order on the same day.

It was strongly urged by counsel for the landlords that the postponement of the declaration puts into the hands of the Estates Commissioners a weapon which may be used by them for the purposes of putting undue pressure on vendors to reduce prices, even in cases within the zones. My answer to that is that that weapon, even if it can be so used, is put into their hands by the Act of Parliament, and it is not for me either to criticize or control their use of it.

A good deal was also said upon the hardship to vendors in having to incur all the expenses and trouble of negotiating sales and executing purchase agreements with the possibility before

them of the Commissioners refusing to declare the estate. That hardship, however, has not arisen in this case owing to any postponement of the declaration, because all the negotiations were carried through, and all the agreements were signed, before any application to declare the estate was made to the Commissioners; and nearly all the cost, expense, and delay that have been incurred since have been caused by the refusal of the vendors' solicitors to answer the second query of the 30th November, 1906.

There is another aspect of this matter which I think vendors should not overlook. If the declaration under sect. 98, sub-sect. 1, were made at an early stage, before all the tenants and other persons had signed agreements for the purchase of the holdings and parcels of land comprised in the *declared* estate, a few obstinate tenants, by refusing to buy at any reasonable price, might upset the entire sale, because unless the whole *declared* estate is sold the sale cannot be carried through; and, therefore, the vendor, in such a case, would be forced either to sell to these tenants at a sacrifice, or abandon the sale.

Before passing from this question, there is a matter, already referred to in dealing with question 3, upon which I would like to add a few words, and that is the question of title. It was contended on behalf of the vendors that no inquiry into title should be made until after the final declaration under sect. 98, sub-sect. 1, had been given. Now I have already stated that, in my opinion, a mere *inquiry*, whether it be confined to *prima facie* title, or extended to the general title, is not a "definitive" step requiring a prior declaration of an estate. But while, according to my view, the inquiry under sect, 17 into *prima facie* title ought to be the first step in the procedure to carry out a sale, because, if the vendor cannot be *dealt with as an owner*, nothing further should be done in the matter, I think no vendor should be required to go into or deal with the general title, until after the purchase-money, in the case of direct sales, is lodged to credit, and this I understand has always been the practice; for although the examiners, in many cases, having read the title-deeds and documents with reference to *prima facie* title, find it a great saving both of time and labour to issue their rulings at the same time, both as to the *prima facie* title and the general title, a solicitor is never *required* to

Wylie, J. 1907.

In re WEIR'S ESTATE.

discharge any ruling as to the general title until after the purchase-money is lodged.

Now the only question remaining is question 1, which asks, whether the Estates Commissioners had jurisdiction to require the vendors to furnish, in the case of the fifty-six judicial tenants, a statement showing the rent paid by each tenant during the last five years? The ground on which exception was taken to this question, and an answer to it refused, was that it was an inquiry into the security for the amount of the advances, which, it was alleged, the Commissioners had no jurisdiction to make. Now, having regard to what I have said as to the Provisional Declaration in dealing with question 4, I will consider this question on the assumption that no declaration whatever under section 98, sub-sect. 1, has been made. As I have already said, I am not told for what purpose an answer to this question was required; but, assuming for the present that it was, as contended by counsel for the vendors, an inquiry into the security of the holdings for the amount of the several advances applied for, the question is, had the Commissioners jurisdiction to make it? Everyone admits that if the estate had been *declared* in any case coming within sect. 1, sub-sect. 1, there is no power to inquire into the security for the advance, *i.e.*, whether the security, in such case, is sufficient; and on the assumption above-mentioned the question I am asked is, in effect, this—Whether the same disabling provisions apply prior to the declaration? Now, if any question arising upon this complicated Act has been clearly decided, I think this one has. Several cases were referred to by counsel, but none of them seems to me to touch this question except *Scottish Union Co.'s Case* (1). In that case two questions, amongst others, were submitted for the decision of my predecessor—(1), whether, assuming that the Commissioners were satisfied that the annuities in respect of the advances applied for could not be duly paid, they had jurisdiction, for this reason, to refuse to make the declaration under sect. 98, sub-sect. 1? and (2), whether the Estates Commissioners had jurisdiction to refuse to make the declaration upon the ground that the security for the advance applied for was, in their opinion, insufficient? Both these questions applied to cases within the

(1) [1906] 1 I. R. 42.

zones; and the learned Judge answered both questions in the affirmative. That, therefore, is a clear and express decision on the very question submitted to me, and I must give a similar answer.

But there is another aspect of this question that must not be overlooked. The vendors' solicitors, in their letter of the 7th December, 1906, assumed that the object of the query objected to was to inquire into the security for the amount of the advances; and the same view was pressed upon me by the vendors' counsel. Now I have little doubt that, when the query was sent by the Commissioners, the question of security was, in one sense, present to their minds; but, as I have said in dealing with question 2, the second query of the 30th November, 1906, more particularly when explained by the further query of the 1st February, 1907, does not seem to me to have reference to the prices at which the individual tenants had agreed to buy, or to the adequacy of the security of any individual holding for the purchase-money agreed upon, but is an inquiry into the circumstances of the estate as a whole, and its past history as to rent. Suppose a number of the tenants had, either in combination or otherwise, paid no rent for eight or nine years, and had since the signing of their agreements failed to pay the interest in lieu of rent; and suppose eviction decrees had been obtained against them, but for some reason were never executed, is it the law that, in a case like that, where the landlord had failed for eight or nine years to recover either rent or possession, the Estates Commissioners are bound, without any inquiry into the facts, to make the advances applied for by these tenants, because the landlord had got them to sign agreements within the zones, and thereby, in all probability, throw upon the Land Commission not the onus of merely collecting the interest in lieu of rent and the purchase annuities, but the odium and loss involved in doing what the landlord failed to do, viz., evicting and selling out the tenant-purchasers? Let it not be supposed that I have put an imaginary case—I am speaking, I regret to say, from official knowledge. Is it to be said then that, where the Estates Commissioners find from the documents in their hands that many of the tenants, even in zone cases, at the date of the agreements for purchase, owed from five to nine years' rent, they are not entitled

Wylie, J. 1907. *In re* Weir's Estate.

to ask whether these are old arrears carried forward against the tenants, or whether the tenants had paid no rent for periods varying from five to nine years prior to the sale? In my opinion, the inquiry was one which, under the circumstances stated in the memorandum, the Commissioners had power to make; and for this reason also I answer the first question in the affirmative.

J. E. W.

Appeal. 1908. Jan. 23.

The vendors appealed (1).

The Right Hon. J. H. Campbell, K.C., and *G. W. Walker, K.C.*, for the appellants:—

The Estates Commissioners had no jurisdiction to deal with the matter at all, unless and until the property is declared an estate. All the duties and functions of the Commissioners in the first part of the Act of 1903 contemplate the existence of an estate. The schedules appended to the originating application, and the information which the rules require such schedules to contain, were intended, and were sufficient, to enable the Commissioners to say, without any inquiry as to security, whether the property was fit to be regarded as a separate estate. Under sect. 1 as soon as a lot of land is offered for sale, and the tenants are real tenants, if the prices are within the zones, the question of security is not open at all: *Re Dayrolles Crosbie's Estate* (2). The decision of Meredith, J., in *The Scottish Union and National Insurance Co.* (3), is inconsistent with the decision of the Court of Appeal in *Crosbie's Estate* (2). Several definitive steps have been taken in this case by the Commissioners in the exercise of their jurisdiction over the estate—(1) There was the filing of the originating application; (2) the inspection of the lands; (3) the investigation of title; (4) the receipt of the interest in lieu of rent by the Land Commission.

The Estates Commissioners have acted inconsistently in this case, because they have expressed their willingness to purchase

(1) In the Court of Appeal, before The Lord Chancellor, and Fitz-Gibbon and Holmes, L.JJ.

(2) [1907] 1 I. R. 116.

(3) [1906] 1 I. R. 42.

under sect. 6, if there was a reduction in the price. It is impossible for them to contend that this is not a separate estate.

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*), *Serjeant O'Connor, K.C.*, and *Dudley White*, for the Treasury :—

The duty of the Commissioners is to determine—(1) whether the property is a separate estate; and (2) to sanction the advances. They must keep distinct the estate and the holdings. They are dealing with the owner as to the estate, and they are dealing with the tenants as to advances. It is not mandatory on them to declare the lands before them, in any case, to be a separate estate. They are bound to make the fullest investigation before advancing the State money, and they are practically in the position of mortgagees. If so, the first question to ask would be—have the tenants been paying their rents regularly ? or, what is the amount of the arrears ? The question was not raised directly in this case; but it was the same question as in *The Scottish Union Insurance Co.'s Case* (1). Were the Commissioners justified in refusing to declare it an estate, because the security was deficient ? We submit that they are entitled to do two things—(1) to inquire as to the position of the estate; and (2) to see as to advances. We say that no definitive steps had been taken; there had only been inquiries. It is admitted here that arrears have been added to the rent. In calculating the amount of the purchase-money the arrears may be taken into account, provided the claim is not barred by the Statute of Limitations, or irrecoverable under section 16 of the Land Act of 1896. It is only arrears that are a charge on the holding that may be added to the purchase-money.

Sect. 1 of the Act of 1903 must be read in connexion with sect. 98. It is true that sect. 1 is mandatory in its terms; but when the modification introduced by sect. 98, sub-sect. 1, is brought in, the Estates Commissioners are entitled to exercise their discretion.

Jellett, K.C. (with him *Ronan, K.C.*, and *De Renzy*), for the Land Commission, stated that, in making the requisition, the Commissioners had regard to the question of security for the

(1) [1906] 1 I. R. 42.

Appeal. 1908. *In re* WEIR'S ESTATE.

advances, in addition to the question of congestion and the condition of the holdings, and that, having regard to the decision in *The Scottish Union Co.'s Case* (1), they held that they were entitled and bound to consider the question of security.

THE LORD CHANCELLOR :—

In this case four questions have been submitted by the Estates Commissioners to the Judicial Commissioner for the purpose of obtaining his opinion as a guide for them in carrying out the sale of this estate. The questions, as is usual, are submitted upon a memorandum stating facts, the material ones being the following :—

The lands are in the hands of sixty-one tenants, fifty-six of whom are judicial tenants and five not. An originating application under the rules was lodged on the 20th December, 1904, and filed on the 3rd March, 1905. Purchase agreements, all dated the 1st November, 1904, were lodged, sixty of them on the 14th January, 1905, and one on the 24th January, 1905. In the case of the judicial tenancies the prices were zone prices. What is called a Provisional Declaration was made on the 25th May, 1905, which runs—"Subject to the result of such further inquiries as may be made the lands referred to may be regarded as an estate, and the interest payable by the purchasers may be paid until further order to Messrs. W. C. Hogan & Sons, vendors' agents." An Abstract of Title was lodged on the 28th February, 1906, on which rulings were made by the Examiner on 22nd January, 1907.

On the 30th November, 1906, a query was sent by the Commissioners to the vendors' solicitors asking what arrears of rent had been added to the purchase-moneys, and also a statement what rent had been paid during the last five years. The vendors' solicitors sent a reply on the 30th November, 1906, giving a statement as to what rents had been paid in the case of each non-judicial tenant, but refusing it in the fifty-six judicial, on the ground that the Commission had no jurisdiction—the prices being zone prices—to make any inquiry or investigation into whether there was sufficient security for the advances applied for.

(1) [1906] 1 I. R. 42.

Some correspondence followed, in which the Commissioners insisted on the information being given, and on the 5th February the vendors' solicitors furnished a memorandum for submission to the Judicial Commissioner upon the point, and on the 10th May they applied to the King's Bench Division for a writ of mandamus, the result of which was that four questions were settled which are now before us on the appeal. The ruling of Mr. Justice Wylie, dated 3rd July, 1907, upon these was—"The Court doth answer the first question in the affirmative, and being of opinion that questions 2 and 3 are general and hypothetical in their character, doth decline to answer same save so far as they may be answered by the reply to the fourth question, which the Court doth answer in the affirmative."

I shall state later on the answers which I think should be given to the four questions; but I think it convenient at this stage to express my opinion on questions which appear to me to be evolved from the facts which I have stated, and which will furnish guides for the answers which I think should be given to the four questions.

First—As to the legality of making what has been called a Provisional Declaration, and the time and manner of making under section 98 a declaration that an estate is fit to be regarded as a separate estate for the purposes of the Act, we are told by the Estates Commissioners that it is not their practice to make a final declaration until the same day as, and simultaneously with, the certificate under sect. 98 of the Act, and the vesting of holdings in the tenant purchasers, and lodgment of the purchase-money in bank, and making of the order attaching claims to the purchase-money.

I have no doubt this practice originated in a desire to convenience vendors and expedite sales of estates. I need scarcely point out how desirable it is, once negotiations with tenants have been initiated, that the estate should be taken in hands by the Estates Commissioners. The practice was certainly followed without question in cases which have come before us; but now that its legality is directly challenged, we are bound to decide the point, and in my opinion the practice is not warranted by the statute. I think the Act contemplates that the first thing to be done after the filing of the originating application is, after all preliminary

Appeal. 1908.

In re WEIR'S ESTATE.

The Lord Chancellor.

inquiries material to guide their judicial discretion have been made, to declare the lands or such part of them as the Commissioners think right an estate for the purposes of the Act. Till that is done they have no subject to operate on in the way of sanctioning or making advances or carrying out a sale. I do not think it necessary to express an opinion as to whether they can in any case and at any stage recall a declaration once made.

Secondly—I think it clear, and it follows from our decisions already pronounced, that once the Commissioners have made the declaration, they have no jurisdiction afterwards when applications for advances of State money are made to them by tenants who have agreed to buy at zone prices to consider whether there will be sufficient security for the payment of the annuities fixed consequent on those zone prices. They have, however, the duty imposed on them by section 1, sub-section 1, to have regard to the limitations to the amount of advances to tenants under the Act, and also to be satisfied that the tenant is in occupation of the holding. All this involves, as said by Lord Justice FitzGibbon in *Talbot Crosbie's Estate* (1), the duty and right to ascertain that every tenancy sold is a real tenancy, and not one created conditionally, or for the mere purpose of getting money from the State. This view will in this particular case furnish an answer to one of the questions put to us.

Thirdly—I do not think it is possible, even in those cases which are presented to the Estates Commissioners as within the zones, to lay down any hard and fast rule as to what inquiries may be made or information demanded by them before they exercise their judicial discretion in declaring lands the subject of an originating application, fit to be regarded as a separate estate for the purposes of the Act. Those words "for the purposes of the Act" include all the steps that follow the declaration save so far as they are regulated and controlled by legislation. The sub-section contemplates two stages—(1) the making the declaration, and (2) the making of an application for, and sanctioning of, the advance; and (*a*) and (*b*) of the sub-section themselves mention conditions which must be had regard to. I think it is their duty to ascertain whether the "holding," the "judicial rent," and

(1) [1905] 1 I. R. 585.

"existing rent" are all real and not manufactured with the view of getting money from the State; and I think it is impossible to say that the arrears due on the estate, and the manner in which the rents have been paid, may not be useful guides to the exercise of their discretion. If the estate was found to be covered by ejectment decrees unexecuted, I think it would form a subject for consideration. I quite agree that when once real factors are found on which zone prices have been arranged the presumption of security for payment of the annuities arises; and when those circumstances exist before the declaration comes to be made, I do not think the Commissioners can do indirectly what they could not do directly, and ground a non-exercise of their discretion on the insufficiency of the security for the annuities.

As regards the case of *The Scottish Union and National Insurance Co.* (1), the declaration under section 98 had not been made; but still I think the decision went too far, so far as it laid down that a refusal to make the declaration could be based on the specific ground that there was not security for the annuities; but I am not prepared to say that No. 2 of the requisitions in that case was not to be had regard to. In judging of the action of the Estates Commissioners in the present case we must bear in mind that the decision of Mr. Justice Meredith, which was not appealed from, was binding on them.

The answers which should, in my judgment, be given to the four specific questions submitted to Mr. Justice Wylie are as follows:—

No. 1 raises a concrete case; and for answering it we are bound to assume on the facts (1) that a declaration (provisional though it was) had been made, and (2) that the object of the Estates Commissioners in their requisition was to see whether security existed for the advances and annuities. Under the circumstances I think the answer should be in the negative.

The answer to No. 2 should be, I think, in the affirmative. It is impossible to lay down categorically that there are not definite steps which may be taken, and in many cases must be taken, before making the declaration. What they are will depend upon the circumstances of each case.

(1) [1906] 1 I. R. 42.

Appeal. 1908. *In re* Weir's Estate. The Lord Chancellor.

As to No. 3.—Save so far as regards definite steps necessary to be taken with a view to a determination whether the lands are fit to be regarded as a separate estate, I think the answer must be in the negative.

It follows from what I have already said that the answer to No. 4 should be, in my opinion, in the negative.

Fitz Gibbon, L.J.:—

I wish that we could have given written answers to the four questions in this case, which would not only have been, as I hope the answers read by the Lord Chancellor are, clear and complete, but also would have explained their ground and scope sufficiently to make any observations upon them, at least from me, unnecessary. I believe that there is no difference of opinion whatever among us; and the multiplication of concurring judgments involves some risk of supplying arguments for limiting or extending the effect of what is the unanimous judgment of the Court.

I shall therefore say as little as I can.

Question 4 is the only one which we can answer categorically—"Yes" or "No."

Question 1 is the only one which is specifically answered *upon the evidence* as to the action of the Estates Commissioners in the particular case of *Weir's Estate*.

The terms of Questions 2 and 3 are general, if not abstract; and we have found it necessary to answer one of them with a proviso, and the other with an exception.

I take Question 4 first. I hold that a judicial determination and declaration by the Estates Commissioners under section 98 (1) that lands are fit to regarded as a separate estate for the purposes of the Act of 1903, is a condition precedent to putting the provisions of the Act into execution for the purpose of carrying out a sale of any lands. In short, the declaration under section 98 (1) is the foundation of the jurisdiction to proceed with the consideration of the application for advances, and with the other steps towards the sale of the lands.

In order to determine whether they are to make the judicial declaration that the lands are fit to be regarded as a separate

estate, it is within the power, and it is the duty, of the Estates Commissioners to make every inquiry, and to obtain all information, which can be reasonably considered material, and I disclaim any intention to put any limitation upon such inquiry or information *a priori*, by saying that anything must necessarily be irrelevant in all cases. In my opinion, the scope of the inquiry cannot be limited by any general definition. It includes the title and tenure of the lands, as well as their character, situation, and physical quality, and it includes also the relation between the parties interested as purchasing tenants and a selling landlord. Among the most important subjects of inquiry—in fact what the Chief Baron in *Talbot Crosbie's Case* (1) called the "cardinal matter"—is the ascertainment that the proposed sale is a real transaction. I repeat what I said in *Dayrolles Crosbie's Estate* (2), that the most important matter upon which the Estates Commissioners are not only at liberty, but bound, to satisfy themselves, is that "the sale of the holding" (being a real holding on the terms alleged) "is honestly made and carried out for the agreed price, and that there is no fraud or concealment." If not satisfied upon these points, they ought not to declare any lands fit to be regarded as a separate estate for the purposes of the Act, and they must be satisfied of that—and must so declare, not provisionally, but by way of judicial determination—before they can take any step in exercise of the jurisdiction which only arises when the declaration is made, viz.:—the jurisdiction to consider the application for advances, and to carry out by a sale the application of the provisions of the Act to the estate. But once the jurisdiction attaches for the "*purposes*" of the Act the "*provisions* of the Act," including sect. 1 (1), apply, and must be obeyed by the Estates Commissioners and by everyone else.

We answer Question 4, that a provisional declaration essential to jurisdiction is illegal.

I next take Question 1. Among "the provisions of the Act," sect. 1 (1) excludes from the consideration of the Commissioners, in every case to which it applies, the two considerations which fall within their province under sub-sect. 2, where, *but only where*, the

(1) [1905] 1 I. R. 577. (2) [1907] 1. R. 134.

Appeal. 1908. *In re* WEIR'S ESTATE. Fitz Gibbon, L.J.

provisions of sub-sect. (1) are "not complied with": viz.—(*a*) whether they are satisfied with the security, and (*b*) whether they consider the agreed price to be equitable. These considerations are, or may be, at opposite sides of the account. A price so high that the instalments will not be secure, concerns the Treasury and the purchaser; but a price so low as to be inequitable may affect a needy or reckless vendor, or incumbrancers, or the owners of limited interests in settled estates. Both are equally excluded from the "zones," and the plain effect of sub-sect. (1) is to make a certain fixed proportion between the agreed price and the previously fixed judicial rent, conclusive evidence for the purposes of the Act, that the price is fair—sufficiently secured on the one hand, and equitable on the other. The Estates Commissioners "shall" make the advance, and consequently they have no jurisdiction or right to require information for the purpose of refusing to make it on the ground that the security is insufficient. It being clearly proved that their only object—in this case—in asking the questions mentioned in Question 1 was to obtain information to be used in determining whether the security was or was not sufficient, in the case of holdings to which sub-sect. (1) applied, we answer that question in the negative. But that answer, given on the facts of *Weir's Estate*, must not be taken to imply that similar or any other questions may not, under other circumstances, be relevant to the question whether other lands are or are not fit to be regarded as a separate estate for the purposes of the Act.

The proposal of the Estates Commissioners to buy this "estate" themselves, if the vendors would sell it to them at a reduced price, is wholly inconsistent with the existence in their minds of any doubt that it was "fit to be regarded as a separate estate" for the purposes of the Act.

Our answer to Question 2 is—in effect—a general declaration, by way of proviso, that it is only to the extent to which the consideration of applications for advances is *not* for the purpose of ascertaining what sect. 1 (1) excludes from the determination of Estates Commissioners, that such applications can be considered "*at all*" by them upon the preliminary inquiry which is to lay the foundation for the declaration under sect. 98.

Appeal. 1908. *In re* WEIR'S ESTATE. Fitz Gibbon, L.J.

Our answer to Question 3 declares, in general terms, that a similar exception or limitation applies to the "steps" which may be taken before the jurisdiction has been attached by a declaration under sect. 98. Those steps—"definite" "definitive" or other—must be confined to what is required for that stage.

On the facts of this case it is plain that many important, tedious, and expensive "steps" were taken by the Estates Commissioners, which went far beyond the stage at which their jurisdiction ought to have been judicially ascertained by a declaration that the lands were fit to be regarded as a separate estate for the purposes of the Act. These steps were, in fact, taken on the second stage of the journey, before the first had been completed. The only redress which the Estates Commissioners can now give for the consequence of having taken those steps—now that the ground on which they broke off the proceedings is found to be outside their jurisdiction—is to treat the provisional declaration as absolute, and to proceed with the sale, of course without prejudice to any question within their jurisdiction which has not yet been determined by them, provisionally or otherwise.

HOLMES, L.J.:—

I shall first read the answers which we give to the four questions submitted to the Court:—

No. 1.—It appearing from the correspondence that preceded the reference to the Judicial Commissioner, and it being also admitted by counsel for the Estates Commissioners, that their object in requiring the vendors to furnish the statement in this question set forth was to consider whether the holdings of the fifty-six tenants therein referred to were sufficient and adequate security for the purchase-money agreed by the landlords and tenants to be paid therefor, this question is answered in the negative.

No. 2.—Provided and to the extent that the consideration of the application for advances on this estate was not for the purpose of ascertaining whether the said fifty-six holdings were sufficient and adequate security for the purchase-money agreed on by the landlords and tenants, the Estates Commissioners had jurisdiction to

Appeal. 1908.

In re WEIR'S ESTATE.

Holmes, L.J.

consider the applications for advances as an element in determining whether the estate was fit to be regarded as a separate estate.

No. 3.—This question will be answered in the negative, save so far as regards any definite step which the Estates Commissioners may consider it material and necessary to take for the purpose of arriving at a determination whether the lands are to be regarded as a separate estate for the purposes of the Act.

No. 4.—This question is answered in the negative.

This appeal relates to questions of law referred by the Estates Commissioners for the decision of the Judicial Commissioner pursuant to the Irish Land Act, 1903, sect. 23, sub-sect. 1. This provision does not contemplate a reference of abstract or hypothetical questions, but of questions that have arisen in dealing with a particular estate, and that affect the rights of persons interested therein. Neither the Statute, nor the rules made thereunder, prescribe the method by which the Judge is to be informed of the facts and circumstances relevant to the consideration of the legal questions. It has, however, been the practice to introduce the questions by a memorandum prepared by or under the direction of the Estates Commissioners, and the memorandum in the present case, taken in connexion with the correspondence between the Commissioners and the solicitors for the vendors, that preceded the reference, supplies all necessary information. It appears that the originating application in the matter, which comprises the entire of the vendors' property, consisting of fifty-six judicial and five non-judicial holdings, was lodged with most, if not all, the prescribed documents on the 20th December, 1904. All the agreements to purchase by the sixty-one tenants were lodged in the following January, and the originating application having been filed on the 3rd April, the lands comprised in the first schedule thereto were declared provisionally to be an estate on the 25th May, 1905. The abstract of title was lodged on the 28th February, 1906, and in the month of October following the lands were inspected by the Commissioners' officer, who I presume sent in his report soon after. On the 30th November, 1906, the Commissioners requested the vendors' solicitors to furnish to them—(1) A statement showing the amount of the arrears of

rent which had been added to the purchase-money of each holding, and how such arrears had accrued; (2) a statement showing the rent paid by each tenant during the last five years. On the 7th of the following month the vendors' solicitors furnished what is admitted to be a complete statement in answer to request (1); and in reply to request (2) a statement showing the rent paid by each non-judicial tenant during the five years previous to the 1st May, 1904, accompanied by what was in effect a refusal to give similar information regarding the judicial tenants, on the ground that the Commissioners have no jurisdiction in the case of judicial tenants, whose purchase annuities are within the zones, to inquire into the security for the amount of the advances. Further correspondence followed in which the Commissioners insisted upon an answer to the requisition, and the solicitors refused to give it on the ground already stated by them; and, although in one letter the Commissioners called attention to the fact that they had not mentioned security, the only inference that can be reasonably drawn is, as the solicitors stated in a letter of the 11th January last, that the sole object of requiring the information asked for must be to enable the Commissioners to go into the question of security, and nothing else. They add a good reason for this conclusion in the following words:—"If we are wrong in this, then the query becomes unintelligible, as we can hardly conceive that the Commissioners would wish to put vendors to such enormous trouble as that involved in complying with this query, merely as a matter of office routine, because in our experience this is the first case in which such information has been asked for."

It is unnecessary to discuss this matter further, inasmuch as Mr. Jellett, whom we heard on behalf of the Commissioners at their own request, has admitted in the frankest way that the object of his clients in pressing for the information was to help them to decide whether the judicial holdings would be sufficient securities for the advances applied for in respect thereof. On the 5th February, 1907, the vendors' solicitors sent the Commissioners a memorandum and questions of law which they asked to be referred to the Judicial Commissioner for decision, pursuant to the section already quoted. In this, the vendors were clearly within their rights, as the section makes a reference mandatory, if

Appeal. 1908. *In re* WEIR'S ESTATE. Holmes, L.J.

applied for by a person interested, unless the Commissioners certify in writing that the application is frivolous—a certificate which could not be given in the circumstances of the present case. After this date, there was considerable delay, and indeed a writ of mandamus was applied for on the 10th May in the King's Bench Division before the reference was made. At the same time, I should be sorry to suggest that the delay arose from a desire on the part of the Commissioners to avoid the duty imposed on them by the statute. The vendors were anxious to have the sale carried out at once, and were prepared to make some reduction in the price, and this led to negotiations between their solicitors and the Commissioners. At length the questions were stated in a form said to be settled, or at least recommended, by the Lord Chief Baron on the application for the writ of mandamus, and we must now dispose of them. The first was, I think, intended to raise the real matter in controversy between the vendors and the Commissioners —whether the latter had jurisdiction in the case of the fifty-six judicial tenants to inquire whether their respective holdings were security for the purchase-money agreed upon between them and the vendors. Accordingly, taking the question in connexion with the facts that led to the reference, I introduce into it after the words "on this estate" and before the words "a statement" the words "for the purpose of helping them to determine whether the holdings of such tenants were sufficient security for the purchase-money agreed on in respect thereof." Unless I read the question in this way it would not relate to any matter in controversy, and ought not to be answered at all. I find a judgment of the present Master of the Rolls: *In the Matter of the Estate of the Scottish Union and National Assurance* (1), in which he seems to have held that the Estates Commissioners had jurisdiction to refuse to declare the lands comprised in an originating application a "separate estate" for the purposes of the Act on the ground that the holdings of judicial tenants who had agreed to purchase for a price within the zones would not be an adequate security for the advance of the purchase-money. It is possible that I may have misconceived the effect of his decision; but I hope to state my own

(1) [1906] 1 I. R. 42.

view of the law in language that will leave no room for doubt. I am satisfied that when it appears that judicial tenants have agreed to purchase for a price within the zones, it must be assumed by the Estates Commissioners that their holdings are adequate security for the purchase-money thus arrived at, and that they have no jurisdiction to consider or inquire whether this is so or not, either in relation to their declaration as to the fitness of the lands to be regarded as a separate estate for the purposes of the Act of 1903, or, as far as I can see, for any other purpose.

In *In re Dayrolles Crosbie's Estate* (1), I considered sect. 1, sub-sect. 1 of the Act of 1903, and stated what I thought was its effect in words to which I have little to add. Having pointed out that under the Land Purchase Acts from 1885 down to 1903, the Land Commission was authorized to provide the entire of the price agreed upon between the landlord and tenant subject to certain conditions, one of which was that the Commission should be satisfied with the security, I called attention to the considerable changes introduced by the Act of 1903, in the then existing legislation relating to State-aided purchase. The most important of these changes is to be found in the first sub-section of sect. 1. "Theretofore," I said, "a purchase agreement could only be carried out if the Land Commission were satisfied that the holding agreed to be sold would, in the hands of the purchaser, be good security for the annuity charged thereon in repayment of the sum advanced by the State. It thus became the duty of the Land Commission to have the circumstances of the property inquired into and the lands inspected, with the result in many cases of their declining to sanction the advance. The effect of the aforesaid section is, that where the holding agreed to be sold is subject to a judicial rent, the Land Commission is directed to sanction the advance without investigation as to the sufficiency of the security, provided the purchase-money falls within certain prescribed limits. The limits depend upon the extent to which the purchase annuity payable in respect of the advance is less than the existing rent; and holdings to which the provision applies, by the happy use of a familiar word, are popularly

(1) [1907] 1 I. R. 116.

Appeal. 1908.

In re Weir's Estate.

Holmes, L.J.

described as coming within the 'zones.' Where such holdings comply with the other provisions of the Land Purchase Code, none of which are material to my present purpose, it is mandatory on the Land Commission to advance the whole of the price." The policy of the provision with which I am dealing is that in the cases that come within it, the Legislature has thought it right to relieve the Land Commission from considering whether the holding is of sufficient value to secure the price agreed on, by imposing on it a positive duty to make the advance. Compare sub-sect. 2 with what precedes. It runs:—"If the foregoing provisions are not complied with, the Land Commission may, subject to the limitations in the Land Purchase Acts, sanction the advance if they are satisfied with the security." There could not be a clearer proof that the essential difference between the two sub-sections is that in cases within the first there is to be no investigation on the subject of security; but that in cases under the second there must be investigation, and satisfaction in reference thereto.

I have been labouring a proposition that seems to me to be so clear that it could not be questioned on the terms of the section itself. But it is met by an argument which, if I understand it aright, is the most extraordinary ever used in the construction of a statute. It turns upon the opening words of the section, "In the case of the sale of an estate," taken in connexion with the definition of an estate in sect. 98. The expression "estate" means any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act. We are told that although it is true that the Land Commission must, under the terms of this sub-section 1, advance the purchase-money when it comes within the zones, regardless of the security, they are at liberty to consider this very question of security before declaring the lands fit to be regarded as a separate estate, and to refuse to do so if they think the security inadequate. I am of opinion that if I were to give such a construction to the statute, I should be imputing to the Legislature an intention to deceive, which I should be sorry without the strongest evidence to impute to a private individual. If one of the parties to an agreement, after consenting to stipula-

tions therein declaring in unambiguous terms their respective rights, were in a subsequent part of the agreement to introduce an ambiguous provision in the hope, and with the object, that a judicial tribunal would so construe it as to take away the rights previously defined, I should look on such a man as a rogue. This is in effect what we are asked to do by the Treasury when it is argued that we are to disregard the clear language of sub-section 1 by giving a construction wholly inconsistent with it to section 98. I decline to hold that Parliament frames its legislation on such dishonest lines. Applying the rules of construction with which we are familiar, it is clear that the provisions of section 1, sub-section 1, and of section 98 can stand together. Under the latter, the Estates Commissioners may inquire into and consider many things to assist them in declaring whether certain lands are fit to be regarded as a separate estate for the purposes of the Act; but one thing they are not entitled to take into account, and that is the adequacy of the security, where the purchase-money comes within the conditions expressed in clauses (*a*) and (*b*) of sub-section 1. For these reasons I am of opinion that our answer to the first question ought to be—"It appearing from the correspondence that preceded the reference, and it being also admitted by counsel for the Estates Commissioners, that their object in requiring the vendors to furnish the statement in such question set forth was to consider whether the holdings of the fifty-six tenants therein referred to were sufficient and adequate security for the purchase-money agreed by the landlord and tenants to be paid therefor, the said question is answered in the negative."

Having thus disposed of the first and most important question, I can deal more briefly with the others. The declaration made by the Commissioners on the 25th May, 1905, which I have already mentioned was in the following words:—"Subject to the result of such further inquiries as may be made, the lands referred to in paragraph 4 within"—that is to say, the property let to the sixty-one tenants—"may be regarded as an estate, and the interest payable by the purchasers may be paid until further order to the vendors' agents." I know not what inquiries were made before this declaration, but that there were some such inquiries is shown by the reference to "further inquiries." We are told, however,

Appeal. 1908. *In re* WEIR'S ESTATE. Holmes, L.J.

that it is not the practice of the Estates Commissioners to make a final declaration under section 98 (1) until the same day, and simultaneously with the vesting of the holdings in the tenant purchasers, the lodgment of the purchase-money in the Bank of Ireland, and the order attaching claims to the money so lodged under section 24 (1).

It is impossible to reconcile this procedure with the provisions of the statute; but I wholly acquit the Estates Commissioners of any sinister intention in adopting it. I think their object was to expedite the sale by having the title investigated, and the other steps necessary for completing the purchase taken as soon as possible. But we must now consider its legality; and I have no doubt that the statute contemplates that the first thing to be done after filing the originating application is to make the declaration provided for by sect. 98 (1) if, as a result of their inquiries, they are of opinion that such declaration ought to be made. It is for the Estates Commissioners to determine in each case the nature and extent of these inquiries. If I were to attempt to define or illustrate them, I might only mislead; nor is the Court asked to do so. Question 2 is confined to whether the Commissioners had jurisdiction to consider at all the application for advances on this estate before the declaration. I have already given my opinion that they had no jurisdiction to consider in the case of the fifty-six judicial tenants whether their holdings are a sufficient security for such advances; but subject to this, I am not prepared to hold that they may not consider the applications for advances, if they think that such consideration will assist them in performing their duty under sect. 98 (1). I am unable myself to see how in this case they can derive much or even any assistance therefrom; but as there are five holdings outside the zones included in the originating application, and as Question 2 speaks of jurisdiction to consider *at all* (the italics are mine), I concur in the answer already read.

For the reasons already given, I am of opinion that the two following questions ought to be answered in the negative, with the saving proviso in the answer to No. 3 already stated.

This disposes of the case; but, before I part from it, I take the liberty of saying a few words on a matter which does not come within the terms of the reference, but which is of no small impor-

tance to a Public Department engaged in useful and arduous work. After the proceedings in the King's Bench Division, a letter was written to the vendors' solicitors purporting to come from the Estates Commissioners conveying, as I understand it, a warning that they would not in any event declare the holdings an estate, on the ground that they are congested within the meaning of section 6 (5) of the Act. I cannot regard this letter as representing the considered judgment of the Estates Commissioners. Whoever is responsible for the letter, it must have been written hastily and *per incuriam*. The suggestion that the estate was "congested" had not been made in the previous correspondence, extending over months, and the time to do so had long passed away.

The vendors in this case have been obliged to incur much expense, trouble, and anxiety, in settling questions of general importance; and it will be for the credit of the Department to have the sale completed and the purchase-money distributed at the earliest moment.

Solicitors for the vendors: *W. C. Hogan & Son.*
Solicitor for the Treasury: *W. G. Towers.*
Solicitor for the Land Commission: *W. Alexander.*

R. D. M.

M. R.
1906.
Nov. 27.
Dec. 1.
1907.
June 8.
July 13.
Appeal.
1908.
Jan. 21.

BURTON *v.* NUNAN.

(1906. No. 1058.)

Settlement—Construction of—Lease for life and reversionary term of years—Trust for settlor "or his heirs"—Purchase of fee by limited owner—Graft on previous interest—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *s.* 29.

A put in settlement, on the marriage of his son B with C, lands held under a lease for the life of X and a reversionary term of years, and the stock and chattels thereon, upon trust to permit B to receive the profits and benefits thereof during the joint lives of B and C, and in default of issue of the marriage, and in the event of C surviving B (which event happened), to permit her to receive a jointure of £40 a year, and, subject thereto, "for the absolute use of A *or* his heirs."

B, after the death of A and during the life of X, purchased the fee-simple of the lands under the Purchase of Land (Ireland) Acts, and was registered as owner in fee-simple thereof, under the Local Registration of Title (Ireland) Act, 1891, subject to the equities (if any) arising from the existence of his previous interest in the lands. X died in 1903. B by his will left the lands to D. A died in 1872 without having disposed of his interest (if any) in the lands, leaving B, his eldest son and heir-at-law, and other children surviving:—

Held, (1) that the words "or heirs" were superfluous, or were used by way of substitution to indicate that the lands were to result to the settlor absolutely in the events which happened, and that, having become a chattel interest, they passed to his personal representative on the death of B, subject to the annuity to C; and (2) that the fee-simple acquired by B was subject to the trusts of the settlement, and that on his death the next-of-kin of A became beneficially entitled to the lands for the residue of the term of years, subject to the annuity, and to the stock and chattels thereon.

ADJOURNED SUMMONS.

This was an application on behalf of Francis J. Burton and William J. Nunan, the executors of the will of William Nunan, late of Gooseberry Hill in the county of Cork, farmer, deceased, to take the opinion of the Court, whether the testator had power to dispose of the lands of Gooseberry Hill and the stock thereon to his nephew the defendant, Joseph W. Nunan, having regard to the terms of the testator's marriage settlement, dated July 28th, 1860.

The facts of the case were as follows:—

On December 19th, 1855, J. B. Creagh demised the lands in question to John Nunan (father of the testator), his heirs, executors, administrators, and assigns, for the life of Jeremiah Boyan (then aged ten years) and for the term of sixty-one years to commence and be computed from the 25th March next immediately previous to the death of the said Jeremiah Boyan at the yearly rent of £60. On July 28th, 1860, John Nunan put the lands in settlement on the marriage of his son William Nunan with Ellen Burton; and by indenture of that date, in consideration of the marriage and of the sum of £700, being the marriage portion of the said Ellen Burton, John Nunan assigned the lands to John Burton and Thomas Nunan (the trustees of the settlement) for the residue of the term for which the same were held, and also the cattle, horses, farming implements, and other effects upon the lands, to hold upon the following trusts: namely, to permit William Nunan to receive the yearly profits and benefits of the said premises during the joint lives of William Nunan and Ellen Burton, and, in case Ellen Burton died within five years from the date of the settlement without leaving issue of the marriage her surviving, then in trust to raise £350, and pay the same to Francis Burton (father of Ellen Burton) or such person as he should by deed or will appoint, and in default of appointment to his lawful heirs; and on further trust, in the event of Ellen Burton surviving her husband without issue, to permit her to receive £40 a year during her life, and subject to payment of the said annuity, and the trusts thereinbefore and thereinafter mentioned, to hold the said premises for the absolute use of the said John Nunan or his heirs, and upon further trust, in case there should be any issue of the marriage surviving at the death of William Nunan, to pay to Ellen Burton a child's portion of the said property, and to hold the residue of the said property for the benefit of such child or children equally or in such shares as William Nunan and Ellen Burton or the survivor should by deed or will appoint, and upon further trust that if William Nunan should survive Ellen Burton, she having lived more than five years, then to hold the said lands and premises

M. R. 1906.

BURTON v. NUNAN.

for the sole and absolute use and benefit of William Nunan, his heirs, executors, and administrators.

In the year 1872, John Nunan died, having made a will dated August 16th, 1871, and two codicils dated the 13th and the 25th September, 1872, but he did not thereby dispose of his interest, if any, in the said lands and chattels, nor did the will or codicils contain any residuary devise or bequest. He appointed his sons, William Nunan and Joseph Nunan, his executors, who duly proved the said will and codicils. William Nunan was his eldest son and heir-at-law. John Nunan left five other children, three sons and two daughters; all of them had since died, but four of them had married and left children, who were still surviving.

William Nunan went into possession of the lands and chattels on his marriage, and continued in possession of them till his death. In 1897 William Nunan purchased the lands from the landlord under the Purchase of Land (Ireland) Acts, and on June 5th, 1897, an order was made by the Irish Land Commission vesting the fee-simple in him subject to an annuity of £37 payable to the Irish Land Commission. On July 16th, 1897, William Nunan was registered under the Local Registration of Title Act, 1891, as owner in fee-simple of the lands, subject to the said annuity payable to the Land Commission, or such other annuity as might be substituted therefor, pursuant to the 25th section of the Land Law (Ireland) Act, 1896, until the sum of £925 (the purchase-money of the lands) with interest thereon should have been repaid, and subject to the rights and equities (if any) arising from the interest vested in William Nunan by order of the said Commission, dated the 5th June, 1897, being deemed to be a graft on his previous interest in the land, or arising in any other manner from the existence of such previous interest.

William Nunan died on November 2nd, 1905, leaving his wife surviving, but no issue of the marriage. By his will, dated June 18th, 1905, William Nunan devised and bequeathed the said lands, with the stock, horses, and equipments of all kinds, to his nephew, the defendant, Joseph T. Nunan, charged with payment of £40 a year to his wife for her life, and appointed the plaintiffs his executors, by whom his will was proved on January

26th, 1906. The executors were advised that, in the events which happened, on the death of William Nunan, the next-of-kin of John Nunan the settlor became entitled to the said lands and chattels, and accordingly they took out this summons.

John Murphy, one of the children of a deceased daughter of John Nunan, was appointed to represent the class of the next-of-kin of John Nunan.

A. M. Sullivan, for the plaintiffs.

Charles Doyle, K.C., for the defendant, J T. Nunan :—

It may be contended that when William Nunan died the lands went to the personal representative of John Nunan. This would involve an inquiry as to the next-of-kin of a person who died in 1872. The question whether William Nunan had a disposable interest in the lands depends—(1) on the construction to be put upon the ultimate trust in the settlement in the events which happened, and (2) upon the effect of the purchase of the fee-simple by William Nunan. As to (1), the lessee of a lease *pur autre vie*, or any assignee who is absolute owner of the estate, can alter the devolution of the lands, and the last instrument regulates the devolution : *Brenan* v. *Boyne* (1) ; *Croker* v. *Brady* (2) ; *Whitehead* v. *Morton* (3) ; Jarman on Wills (4th ed.), p. 62. The lease was made to John Nunan, "his heirs, executors, and assigns." He could regulate the devolution ; and the question is, what meaning is to be attached to the words "or his heirs" in the ultimate limitation "for the absolute use of John Nunan or his heirs"?

The word "heirs" here means *persona designata* ; the use of the word "or" shows that it is not meant as a word of limitation : *Sheridan* v. *O'Reilly* (4). A deed should be construed to carry out the intention of the settlor, just as much as a will. Here the intention of the settlor was that, if he was not alive when the particular events happened, his heir-at-law should take. William Nunan was his heir-at-law, as well as tenant-for-life under the settlement. [He referred, on this point, to *De Beauvoir* v. *De Beauvoir* (5) ; *Russell* v. *Smythies* (6) ; *Morris* v. *Cantle* (7) ;

(1) 16 Ir. Ch. R. 87.
(2) 4 L. R. Ir. 653.
(3) 19 L. R. Ir. 435.
(4) [1900] 1 I. R. 386.
(5) 3 H. L. Cas. 524.
(6) 1 Cox, Ch. Cas. 215.
(7) 6 Br. P. C. 418.

M. R. 1906.

BURTON v. NUNAN.

Norton on Deeds, pp. 45, 334.] The other side must say that there were two interests vested in John Nunan; but he had only one interest, namely an estate *pur autre vie*; the term of years never arose; it was only an *interesse termini*, which rests only in contract: *Doe* d. *Rawlings* v. *Walker* (1); Preston on Conveyancing, vol. iii., p. 122; Goodeve, Law of Real Property, p. 162.

As to (2), it is said that by virtue of section 29 of the Local Registration of Title Act, 1891, the interest which William Nunan acquired by the vesting order was to be deemed a graft on his previous interest. But at the time the vesting order was made William Nunan had the entire interest in the lands, or at least he had an estate *pur autre vie*. If William Nunan was a limited owner only, the next-of-kin of John Nunan cannot take the lands free from liability to recoup William Nunan for the payments made by him to the Land Commission in discharge of the purchase-money and interest.

[He also referred, on the question of graft, to *Longton* v. *Wilsby* (2); *Re Biss* (3); and *Bevan* v. *Webb* (4).]

Carrigan, for the next-of-kin of John Nunan :—

Assuming that the lease is correctly recited in the settlement, the term of sixty-one years created by it did not commence till March 25th, 1903, as Jeremiah Boyan only died in that year. The settlement is not a well-drawn deed, and the word "heirs" is used loosely in connexion with personal property; it conveys the chattels as well as the lands on the same trusts to the trustees, their heirs, executors, or administrators, and provides for payment of a sum of money to the lawful heirs of Francis Burton. The intention was that in the events which happened the property should go back to the settlor according to the quality of the estate then in being; and that John Nunan's personal representative was to take the personalty, and his heirs (if he made no will) the realty. The words "or heirs" should be rejected for uncertainty, or be disregarded as mere surplusage. [He referred to *Long* v. *Rankin*, reported in Sugden on Powers (18th ed.), App., p. 895; *Jones* v. *Duggan* (5); *Midland Great Western Railway*

(1) 5 B. & C. 118. (2) 76 L. T. (N. S.) 770. (3) [1903] 2 Ch. 40.
(4) [1905] 1 Ch. 620. (5) 4 Ir. L. R. 91.

v. *Craig* (1); Stroud's Jud. Dict., vol. ii., p. 1345, title "Or."] When William Nunan purchased the fee-simple, he was only tenant-for-life under the settlement, and he held the fee subject to the trusts of it, so that he had nothing to dispose of by his will, and the next-of-kin of John Nunan are entitled to the lands for the residue of the term of years.

M. R. 1906. BURTON v. NUNAN.

Doyle, K.C., in reply:—

If the words "or heirs" are not words of limitation, they must be struck out as superfluous according to the argument of the other side, or be words of designation. It is to be noted that the will of John Nunan is silent as to these lands, which goes to show that he knew he had no disposable interest in them.

William Nunan took the lands as the survivor of his father, and the other events contemplated by the settlement did not happen.

THE MASTER OF THE ROLLS (2):—

1907. July 13.

The originating summons asks for a decision of the following question:—Whether the devise and bequest contained in the will of William Nunan in these words, "I leave, devise, and bequeath the lands of Gooseberry Hill, which I hold, with the stock, horses, and equipments of all kinds, to my nephew, Joseph Tom Nunan," is a valid devise or bequest of the said lands, or is a valid bequest of the said stock, horses and equipments, having regard to the provisions of the indenture of 28th July, 1860?

The question to be answered does not arise upon the construction of the will of William Nunan at all. It arises on the construction of the settlement of 1860, executed on the marriage of William Nunan with Ellen Burton; and I am called on to construe that settlement, and particularly to deal with this clause, "and subject to the payment of said annuity during the life of the said Ellen Burton, and the trusts hereinbefore and hereinafter mentioned, to hold said premises for the absolute use of the said John Nunan (party hereto), or his heirs."

(1) 13 Ir. L. R. 1.

(2) Dec. 1, 1906.—The Master of the Rolls reserved judgment. On June 8, 1907, the case was further argued, on the construction of the Local Registration of Title Act, in consequence of his decision in *Longworth* v. *Campbell*, May 16, 1907 (not yet reported).—[REP.]

M. R. 1907.

BURTON v. NUNAN.

The settlement recites a lease of 19th December, 1855, made between John Bagwell Creagh, and John Nunan, by which the lands of Gooseberry Hill, containing about 180A. 2R., in the barony of Duhallow, and County of Cork, were demised to John Nunan, his heirs, executors, administrators, and assigns, for and during the natural life of Jeremiah Boyan, and for and during the term of sixty-one years, to commence and be computed from the 25th day of March next, immediately previous to the day of the death of the said Jeremiah Boyan, and from then to be fully completed and ended at the yearly rent of £60.

No one could have any doubt as to the true meaning of the lease. The term is for the life of Jeremiah Boyan, and for sixty-one years, to commence and be computed from the 25th March, immediately previous to Boyan's death. It is unnecessary to waste time discussing authorities. I may refer to two: in *In re Crommelin* (1)—a case submitted for the opinion of the Court of Queen's Bench by the Commissioners for the Sale of Incumbered Estates—where there was a power to make leases for any term not exceeding three lives and forty-one years, it was held that a lease for three lives and forty-one years, commencing from the 1st November preceding the day of the death of the survivor of the *cestui que vies* in the lease, was a valid lease within the meaning of such power. The case is one in which the Court of Queen's Bench gave no judgment, but gave the following certificate:—"We are of opinion that the said power in the said lease stated authorized the said Delacherois Crommelin to grant said term of forty-one years, commencing from the 1st of November next preceding the death of such survivor as in said lease granted." There is also the case of *Blackhall* v. *Nugent* (2).

In the present case it is demonstration that the lease of 1855 was a lease for the life of Jeremiah Boyan, with a reversionary term of sixty-one years, to be computed from the 25th of March immediately previous to Jeremiah Boyan's death. Jeremiah Boyan died on the 9th of November, 1903, and that date is material in view of the arguments in this case.

The settlement having recited the lease proceeds—[His Lordship referred to the settlement].

(1) 1 Ir. C. L. R. 182. (2) 5 Ir. Ch. R. 323.

Now, when dealing with the lands of Gooseberry Hill (the life named in the lease being then in being), it is to be observed that the settlor assigned the lands to the trustees, "their executors or administrators," but when he comes to assign the cattle, horses, &c., he uses the words "their heirs, executors, or administrators." The initial trust is declared in somewhat ambiguous terms, but I think it must be held to embrace both lands and chattels personal. It is "during the joint lives of the said William Nunan and Ellen Burton to permit and suffer the said William Nunan to receive and take all the yearly profits, issues, and benefits of said premises."

The lady brought with her a fortune of £700, and the settlement provides that in case of her death within five years from the date of the settlement, without leaving issue of the marriage her surviving, one moiety of the £700 was to go back to her father. This is the way in which the matter is dealt with in the settlement—"And upon further trust in case the said Ellen Burton, the said intended wife of William Burton, should die within the space of five years from the date hereof, without leaving issue of said marriage her surviving, then in trust to raise by sale or mortgage of said premises and effects or otherwise, as they shall think proper, a sum of £350, and pay over same to the said hereinbefore named Francis Burton, or to such person as he shall by deed or will appoint, and in default of such appointment to his lawful heirs. . . . And upon the further trust that in the event of the said Ellen Burton surviving her husband without issue him surviving" (which event happened), "then to permit and suffer the said Ellen Burton to have, receive, and take during her own life, and for her own use and benefit, an annual sum of £40 sterling per annum, to be charged and chargeable upon, and paid and payable out of all said property, whether freehold or chattels, real or personal, . . . and subject to the payment of said annuity during the life of the said Ellen Burton, and the trusts hereinbefore and hereinafter mentioned, to hold said premises for the absolute use of said John Nunan, party hereto, or his heirs."

The indiscriminate use of the word "heirs" in the settlement reminds one of Mrs. Malaprop's "nice derangement of epitaphs"; and when I am asked to attribute a special meaning to the words

M. R. 1907.

BURTON v. NUNAN.

"or his heirs" in the clause last quoted, and to say that the settlement means that John Nunan's heir should, in the events that have happened, take as *persona designata* the lands and chattels personal, and that the settlor used the words "or his heirs" in that sense, I feel inclined to say that the settlor did not use the words "or his heirs" in the sense imputed, or in any sense whatever. I consider that the true meaning of the settlement is, that if Ellen Burton survived William Nunan, leaving no issue of the marriage living at the death of William Nunan, then the settled property should go back to John Nunan for his absolute use according to the nature, tenure, and quality thereof, subject of course to the annuity of £40 for the life of Ellen Burton. This construction brings order out of chaos, for in the events that have happened the reversionary chattel interest became an interest in possession during the life of William Nunan.

Even if this were not the true construction of the settlement, I should find it impossible to decide that the clause in question ought to be read as giving the cattle, horses, farming implements, and other effects on the lands to the heir of John Nunan as *persona designata*. Mr. Doyle suggested that the scheme of the settlement was to keep the chattels and lands together, and that in certain possible events the construction contended for by Mr. Carrigan might result in their separation. Mr. Carrigan, with a suspicion of sarcasm, replied that cattle and pigs could hardly be regarded in the light of heirlooms. I think Mr. Doyle's argument goes too far. The case of *De Beauvoir* v. *De Beauvoir* (1) was mentioned, and I desire to say that, in my opinion, it has no application to the facts of the present case. On the face of the will in that case it was clear that it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated. *Keay* v. *Boulton* (2) refers to the case of *Doody* v. *Higgins* (3), where the Vice-Chancellor said, "The first question is, who were the persons intended by the testator to take under the disposition of the residue

(1) 3 H. L. Cas. 524. (2) 25 Ch. D. 212. (3) 9 Ha. App. 35.

to 'the following persons or their heirs.' I have looked into the cases which were cited in the argument, and into many other cases on this point, and I think that the words 'or their heirs' must be construed as words of substitution, and that the word 'heirs' must be construed heirs according to the nature of the property, that is next-of-kin, the property being given as money to the persons intended to take."

That is my view as to the construction of this settlement, and it seems in accordance with the authorities and with common sense; and I would have had no hesitation in deciding the case were it not for the question arising under the Local Registration of Title (Ireland) Act, 1891, which becomes of importance owing to the fact that William Nunan, while in possession of the lands of Gooseberry Hill, as tenant for life under the settlement, and while the life named in the lease was in being, viz., in the year 1897, purchased the holding of Gooseberry Hill, under the provisions of the Land Purchase Acts; and a vesting order dated 5th June, 1897, was made, vesting the fee-simple in him, subject to equities. The Act of 1887, 50 & 51 Vict. c. 33, s. 14, sub-sect. 3, provides as follows:—"Any person in occupation of, and paying rent for, a holding which is held under a contract of tenancy, shall have power to enter into an agreement for the purchase thereof. Where a holding shall be conveyed to, or vested in, any such person, the interest thereby assigned to him shall be deemed to be a graft upon the previous interest of the tenant in such holding, and shall be subject to any rights or equities arising from its being such a graft."

The Local Registration of Title Act (s. 28) provides as follows: "A person may be registered either—(1) as full owner of land, that is to say, as tenant in fee-simple thereof, or (2) in the case of settled land, as limited owner of the land, that is to say, as tenant in tail or tenant for life thereof; or as having, under the Settled Land Acts, 1882 to 1889, the powers of a tenant for life thereof." Sect. 29 contains provisions for ascertaining and noting on the register burdens arising from the previous interest of the purchasing tenant; and sect. 30 provides: "(1) On the registration of a person as full owner of land, an estate in fee-simple in the land shall be vested in the person so registered. (2) On the regis-

M. R. 1907.

BURTON v. NUNAN.

tration of a person as limited owner of land an estate in fee-simple in the land shall be vested in the person so registered and the other persons entitled to the several estates and interests comprised in the subject of the settlement, collectively, according to such estates and interests respectively."

Mr. Sullivan's suggestion was that there was a slip in sect. 30, sub-sect. 1. It provides for the vesting of the fee-simple on the registration of a person as full owner, without qualifying words or words indicating any distributive intention; while in sect. 30 (2) the Act provides that on the registration of a person as limited owner, the fee-simple shall be qualified and distributed in the manner specified. In this particular case William Nunan was registered as owner in fee-simple, subject to an annuity payable to the Irish Land Commission, but there was this note, "These lands are registered subject to the rights or equities (if any) arising from the interest vested in the said William Nunan by order of the said Commission, dated the 5th day of June, 1897 (No. 8639), being deemed to be a graft on his previous interest in the land, or arising in any other manner from the existence of such previous interest."

Mr. Sullivan contended that the record of title had the effect of concentrating all estates in William Nunan, and that as he was not registered as limited owner but as owner in fee-simple, he was entitled to retain the fee-simple against all comers. But sect. 30, sub-sect. 1, must be read in connexion with sect. 29, sub-sects. 2 and 3, and must be so construed.

I hold that, notwithstanding the purchase by William Nunan, and the vesting order, and his registration as owner in fee, he remained tenant for life of the lands and the chattels under the settlement, and that, on his death, the chattel term of years and the stock passed absolutely to the personal representatives of John Nunan.

THE COURT made the following order:—

"THIS COURT, being of opinion that on the death of the said William Nunan, in the events that have happened, the said lands of Gooseberry Hill, and the stock, horses, equipments, and chattels thereon, vested in the legal personal representatives of the said John Nunan,

as part of the personal estate of the said John Nunan, subject, however, to the annuity of £40 secured to Ellen Nunan, *née* Burton, for her life, by the said settlement of 28th July, 1860, doth declare that the bequest declared in the will of the said William Nunan of the said lands of Gooseberry Hill, with the stock, horses, and equipments thereon, to Joseph Tom Nunan, the nephew of the said William Nunan, is not a valid devise or bequest of the said lands or chattels; and this Court doth declare the parties entitled to their costs of the said summons and of this order, to be paid, when taxed and ascertained, out of the said lands and chattels."

W. L.; R. W. L.

Appeal. 1908. Jan. 21.

The defendant, J. T. Nunan, appealed to the Court of Appeal.

Ronan, K.C., and *Doyle, K.C.*, for the appellant.

Serjeant O'Connor, K.C., and *W. Carrigan*, for the next-of-kin of John Nunan.

A. M. Sullivan, for the plaintiffs.

THE COURT OF APPEAL (the Lord Chancellor, Fitz Gibbon and Holmes, L.JJ.), without calling on counsel for the respondents, affirmed the decision of the Master of the Rolls with costs.

Solicitor for plaintiffs: *Maurice Healy.*
Solicitor for next-of-kin of John Nunan: *Timothy Lucy.*
Solicitor for the appellant: *John L. Keane.*

R. ST. J. C.

Appeal. 1908. Jan. 21, 22, 27.

In the MATTER of the ESTATE of E. C. S. KINGHARMAN (1).

Land Purchase Acts—Purchase of estate by Land Commission—Estates Commissioners—Sale of holding to tenant—Turf—Rights of adjoining tenants—Privilege—Regulations as to turbary—Land Law (Ireland) Act, 1896, *s.* 34—*Irish Land Act*, 1903, *s.* 21.

The Land Commission purchased under sect. 6 of the Irish Land Act, 1903, an estate, on which A was occupying tenant of a holding comprising a quantity of turf within its ambit. Prior to the sale to the Land Commission it was the custom for the landlord to supply other tenants on the estate with "bog tickets," authorizing them to cut and take turf upon A's holding; but, save as to this, no easement, right, or privilege was exercised by anyone in relation to the said turf. A subsequently purchased the fee-simple of his holding from the Land Commission under the Act, and his undertaking to purchase was duly fiated by the Land Commission without reservation, express or implied, of any turbary rights:—

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that sect. 21 of the Irish Land Act, 1903, did not, under these circumstances, empower the Land Commission to make regulations authorizing the cutting or making of turf upon A's holding by other occupiers of land in the neighbourhood of the holding, for whose requirements such turf appeared to the Land Commission to be necessary.

Semble: The cutting or taking of turf by one tenant upon the holding of another, under the authority of a "bog ticket" given him by his landlord for that purpose, is not such a "privilege . . . enjoyed . . . by permission of the landlord" as is contemplated by sect. 34 of the Act of 1896.

Appeal from a decision of the Hon. Mr. Justice Wylie, made on the hearing of questions of law referred for his decision by the Estates Commissioners, as follows:—

Memorandum.

1. In this case the Estates Commissioners have purchased the estate under the provisions of the Irish Land Act, 1903, sect. 6, and it has been vested in the Land Commission.

(1) Before The Lord Chancellor, and FitzGibbon and Holmes, L.JJ.

2. Several holdings on the estate contain large areas of bog. The practice on the estate with reference to the bog before the date of the said purchase, was that, though the bog was included in the ambit of the holding, the landlord had the right to put in other persons to cut turf on same, on payment of a bog rent to the landlord, the tenant having the right of turbary for his own use only.

3. George R. Acheson, a tenant on the estate, who occupied his holding on the terms above mentioned, has purchased the same. The description of his holding was duly amended by order of the Judicial Commissioner, and is now described on the map utilized for sales on this estate as 4 B, 4 D, and 4 E, Portobello, and contains 163A. 2R. 35P.

4. The holding contains a considerable area of turbary, on which, prior to the sale, the landlord exercised the right of turbary above referred to, but the undertaking signed by the purchasing tenant contained no reference to turbary, and the holding has become vested in the said tenant without reference to turbary.

5. The Estates Commissioners find as a fact that the holding contains more than sufficient turf for the use of the proprietor of the holding for a reasonable time. The Estates Commissioners refer the following questions of law for the decision of the Judicial Commissioner.

Questions of Law.

1. Can the Commissioners, notwithstanding that a vesting order has been actually made vesting the holding in the said George R. Acheson, and without any reservation of turbary, make regulations under sect. 21 of the Act, authorizing the cutting or taking of turf on the bog on the holding by occupiers of land in the neighbourhood of the holding, for whose requirements such turf appears to be necessary, upon such terms as to payment or otherwise as may appear to the Estates Commissioners to be just?

2. If so, can the Estates Commissioners, in making such regulations under sect. 21, direct that the payment referred to in that section shall be made to the Land Commission, or their assigns?

Appeal. 1908.

In re KING-HARMAN'S ESTATE.

Mr. Justice Wylie answered the questions in the affirmative (1).

George R. Acheson appealed.

Fetherstonhaugh, K.C., for the appellant :—

The bog here in question was not vested in trustees as was that which had been retained in the landlord's own hands prior to the sale to the Land Commission. It was sold to and vested in Acheson as part of his holding, under a fiat which had the same effect as a vesting order, and which, as well as his "undertaking" to purchase, contained no reservation, or even mention of any turbary rights. That being so, the Estates Commissioners could not afterwards derogate from their grant by sending in other tenants to cut or take turf upon the holding so vested, in a manner analogous to the former landlord's rights under the Act of 1881, sect. 5. No easement, right, or privilege existed as regards this turf prior to the sale to the Land Commission, beyond that of the landlord under the Act of 1881, sect. 5, to enter, or to authorize other persons to enter, upon the holding for the purpose of cutting or taking turf, on making reasonable amends and satisfaction to the tenant; that right could not continue after the holding had been vested without reservation in the purchasing tenant. The Act of 1896, sect. 34, has no application to this case; the tenants who formerly cut turf on the holding paid for permission to do so;

(1) The following judgment was delivered by WYLIE, J. :—

I am quite clear that this case is governed by sect. 21 of the Irish Land Act, 1903. By that section it is provided that on the sale of an estate the Land Commission may make regulations with reference to the supply of turbary where portion of a holding consists of bog, and the purchaser had not an exclusive right of turbary before such sale. I do not see how it is possible to get out of this section in the present case. As a matter of fact, the landlord had rights under sect. 5 of the Act of 1881, and the practice on the estate was in accordance with those rights, as stated in the memorandum of the Estates Commissioners. Therefore, the tenant had not an exclusive right of turbary on the holding, and the Land Commission may make regulations. The matter appears to me to be perfectly clear. I do not think that anything in the Local Registration of Title Act affects the case, because the register shows that the lands were purchased under the Act of 1903, and subject, therefore, to sect. 21. I answer the second question, "Yes," if it appears to them just.

J. E. W.

they enjoyed no easement or right, or any privilege beyond what each "bog-ticket" gave them; they simply bought so much turf from the landlord on each occasion when they took out "bog-tickets."

If the Estates Commissioners are right in their contention, there can be no time limit to the exercise of their powers under sect. 21 of the Act of 1903, which they could claim to exercise ten years after the date of the vesting order, or even after all the purchase annuities had been paid off. This would render the Local Registration of Title (Ireland) Act, 1891, unworkable. This land was compulsorily registered under sect. 23 of the latter Act. By sect. 30 the estate of the registered owner was required to be registered subject (*a*) to the burdens (if any) registered as affecting the land; (*b*) to the burdens to which, though not registered, all registered land is declared by the Act to be subject, *i.e.*, those mentioned in sects. 29 and 47, which do not include that now sought to be imposed. The land certificate, under which Acheson is now registered as full owner of an estate in fee-simple in the land, and which is his title-deed, cannot now be altered by the imposition of a fresh burden which was never contemplated, and was not provided for at the time of the sale. Sect. 21 of the Act of 1903 provides for the making of regulations as to turbary "in the case of the sale of an estate"; these words point to a time, not when the sale had been completed, but when the sale was still an open matter, and when the Land Commission, in whom the rights of the former landlord had become vested, could have provided for the future exercise of their rights. This was not done, and cannot be done now. [He referred to *Knox* v. *Baxter* (1); *Wilson* v. *Gilmour* (2).]

Matheson, K.C. (*J. Craig Davidson*, with him), for adjoining tenants:—

Section 8 of the Purchase of Land (Ireland) Act, 1885, after enacting that every vesting order should be as binding and effectual in all respects as if it were a conveyance executed under the Landed Estates Court Act, continues—"Provided that

(1) 19 L. R. Ir. 460. (2) 31 Ir. L. T. R. 75.

Appeal. 1908.

In re KING-HARMAN'S ESTATE.

where the purchaser of a holding is also tenant of the holding the interest vested in him by such order shall, subject to any charges, rights, or easements set out in the order, be deemed to be a graft upon the previous interest of the tenant. . . ." There being no machinery in the Land Commission corresponding to that in the Landed Estates Court for the ascertainment of rights and easements, section 34 of the Act of 1896 was introduced to dispense with the necessity of ascertaining rights, easements, and privileges upon the sale of a holding; and, by force of that section, the holding vested in the appellant by the fiat continued to be subject to the privileges which had in fact been previously enjoyed by the adjoining tenants of cutting and taking turf upon the holding by permission of the landlord. That being so, we contend that section 21 of the Act of 1903, which is collateral to section 34 of the Act of 1896, empowers the Estates Commissioners, who have stepped into the landlord's shoes, and now have control over the rights formerly exercised by him, to make the regulations here in question. Sub-sect. 2 of section 21 ensures that no injury will be done to the purchasing tenant by the exercise of this power. No reliance can be placed on the fact that no actual reservation was made of turbary rights, as the Land Commission themselves, under section 16 of the Act of 1903, acquired the fee-simple of the estate "subject to any easements, rights, and appurtenances mentioned in section 34 of the Act of 1896," and, accordingly, could only vest the holding in the purchasing tenant subject to the easements, rights, and appurtenances that attached to the holding. [HOLMES, L.J.: The meaning of section 34 is clear; it was intended to include privileges—not strictly rights—which would have been rights, but for the effect of the decision in *Bright* v. *Walker* (1).] The adjoining tenants, who prior to the sale cut turf upon this holding by the landlord's permission, did enjoy "privileges" such as are contemplated by sect. 34. In any event, the purchaser not having had "an exclusive right of turbary" before the sale, section 21 conferred an original jurisdiction upon the Estates Commissioners to make these regulations, the object being to put an end to disputes between the tenants as to their respective rights, and to prevent litigation.

(1) 1 C. M. & R. 211.

Dudley White, for the Treasury.

Fetherstonhaugh, K.C., replied.

Appeal. 1908.

In re KING-HARMAN'S ESTATE.

Jan. 27.

THE LORD CHANCELLOR :—

In this case an important question has arisen as to the effect of vesting orders made by the Estates Commissioners, and their powers as to turbary rights under section 21 of the Act of 1903 as against a purchaser from them who has obtained what is in legal effect a conveyance of his holding by way of vesting order, in which no reservation of any turbary right is contained.

The facts appear in a memorandum submitting two questions of law for the opinion of the Judicial Commissioner.

The Estates Commissioners purchased the King-Harman estate, under the provisions of section 6 of the Act of 1903, for the purpose of reselling it to the tenants.

The material statements in the memorandum are the following :—

Several holdings on the estate contain large areas of bog. The practice on the estate with reference to the bog before the date of the purchase by the Estates Commissioners was that, though the bog was included in the ambit of the holding, the landlord had the right to put in other persons to cut turf on same, on payment of a bog-rent to the landlord, the tenant having the right of turbary for his own use only. Geo. R. Acheson, the appellant, was a tenant on the estate, who occupied his holding on the terms above-mentioned, and he has purchased the same. The holding contains 163A. 2R. 35P., including a considerable area of turbary on which prior to the sale the landlord exercised the right of turbary above referred to; but the undertaking signed by the purchasing tenant contained no reference to turbary, and the holding has been vested in the said tenant without reference to turbary. The Estates Commissioners find as a fact that the holding contains more than sufficient turf for the use of the proprietor of the holding for a reasonable time; and they referred the following questions of law for the decision of the Judicial Commissioners :—

1. Can the Commissioners, notwithstanding that a vesting order has been actually made vesting the holding in the said

Appeal. 1908.

In re KING-HARMAN'S ESTATE.

The Lord Chancellor.

George R. Acheson, and without any reservation of turbary, make regulations under section 21 of the Act authorizing the cutting or taking of turf on the bog on the holding by occupiers of land in the neighbourhood of the holding, for whose requirements such turf appears to be necessary, upon such terms as to payment or otherwise as may appear to the Estates Commissioners to be just?

2. If so, can the Estates Commissioners, in making such regulations under section 21, direct that the payment referred to in that section shall be made to the Land Commission or their assigns?

The general effect of a conveyance by way of vesting order to a purchaser under the Land Purchase Acts was, of course, not disputed, but it was contended that the power which had before the sale been exercised by the landlord, of giving permission to an outsider to cut turf on the bog included in Acheson's holding, was an easement or right within the meaning of sect. 34 of the Act of 1896. That section is in the following terms:—[His Lordship read the section, and continued]—It is plain, I think, that the person who might happen to get a bog-ticket from the landlord giving him a license to cut turf on Acheson's bog in the manner stated in the memorandum had not an easement or right within the meaning of the 34th section. It had none of the characteristics of a right or easement. The memorandum does not find any privilege within sect. 34, and this branch of the section seems to be pointed to the doctrine of *Bright* v. *Walker* (1). If the landlord had conveyed Acheson's holding to him, I do not think that he could, as against his own grant, have continued to grant bog-tickets to outsiders after the date of his own conveyance.

It was quite open to the Estates Commissioners, under sub-sect. 2 of sect. 34, to have reserved a right against Acheson, but this was not done.

It was next contended that sect. 21 of the Act of 1903 gave a new and original jurisdiction to the Estates Commissioners to authorize by rules and regulations the cutting of turf on the bog conveyed to Acheson. I do not think that is the effect of the section. I think it is pointed to a case where the right exists,

(1) 1 C. M. & R. 211.

or is saved, and provides for the mode of working it so as to avert disputes and litigation. It is a useful supplement to sect. 34 already referred to; but I do not think it gives a power to make regulations inconsistent with a parliamentary grant already made.

FITZGIBBON, L.J.:—

It is impossible to hold that the Estates Commissioners can make regulations, unless there is something to regulate, and the narrowest word used to describe the subject-matter of "regulation" is "privilege."

The real question here is whether a landlord, who has sold the fee to a tenant under the Land Purchase Acts, without any express exception or reservation, retains any interest or power under which he can either himself enjoy, or can create in or assign to others, the privilege of cutting turf on the lands sold.

The case, to the newspaper report of which we were referred during the argument, was only one of several which came before the Lord Chief Baron and myself on the North West Circuit, which afforded examples of the grave consequences of leaving questions of turbary rights in respect of lands purchased under this code to be tried upon instruments which purported to give a "registered title" to the fee-simple, and were silent as to these important rights, though dealing expressly with "sporting rights" and other easements or profits *a prendre*.

The admission of parol evidence, subsequent to the completion of the purchase by conveyance or vesting order, to control the operation of the statutory instruments would be perilous.

The decisions have gone so far as to show that actual and existing rights, interests, easements, or even privileges, belonging to or enjoyed by third persons, may be established against a tenant who has purchased under a conveyance or vesting order which is silent on the subject, by going back to see what his "holding" was, and by binding his newly-acquired interest by what bound not only his "holding," but also the vendor who sold the fee to him. In several of the circuit cases which I have mentioned the purchasing tenant was held bound in equity by actual notice of the existing rights of other tenants on the same estate.

Appeal. 1908.

In re KING-HARMAN'S ESTATE.

Fitz Gibbon, L.J.

But the principle of these cases cannot be extended to the present case, unless it can be extended generally to all deeds or vesting orders purporting to convey the freehold and inheritance to tenants purchasing under the Land Law Acts.

The distinction between this and all other cases of which I am aware, is that, on the facts stated, when the lands were conveyed to Acheson, the landlord was the absolute owner in fee, and was not liable to have enforced against him, or against the lands, any right easement or privilege of turbary whatever. He had kept the turbary in his own hands, Acheson had only an occupying tenant's interest in it, and the landlord allowed others to draw turf from time to time only when they took bog-tickets, and paid him for them. It was within the landlord's discretion to give bog-tickets or not, and to charge what he pleased for them. No right or privilege could be acquired by any tenant under that course of dealing, beyond what each "ticket" gave him; and no ticket was outstanding when the sale to Acheson was completed.

We are asked to give to statutory conveyances to purchasing tenants a construction and effect which an ordinary conveyance by an owner in fee-simple could not have, and to do that in spite of the terms by which the Acts indicate the intention that the purchasers shall become absolute owners. If we were to hold that a right of turbary survived to the landlord, or to the Land Commission, after the vesting of holdings in tenants by instruments containing no reservation, or even indication of the existence of turbary rights, we should make confusion worse confounded. It would follow that, in every case of the sale of a holding having any uncut turf within its ambit, on its being established by parol evidence that the landlord, before the sale, had ever either cut any turf for himself, or had allowed anyone else to do so, upon the holding, or even that the turf was not the absolute property of the tenant before the sale, thereupon, to the end of time, as against the purchaser who had become the owner of the land under an instrument purporting to give him everything which the vendor had, the Land Commission might make regulations enabling other people to cut and carry away the turf, on payment of money to the former, or to the Land Commission, or to "the Treasury," each and all of whom had been parties to a transaction which

purported to convert the purchasing tenant into an absolute owner in fee.

I concur with the Lord Chancellor in holding such a result impossible; and I hope that our decision will make it clear to the Land Commission that "turbary rights" ought to be mentioned whenever they are intended to be reserved.

HOLMES, L.J.:—

This estate was purchased under the provisions of sect. 6 of the Act of 1903 by the Estates Commissioners, who thereupon sold a holding therein to George Acheson, the tenant in possession. It appears from the memorandum of reference that previous to the sale to the Estates Commissioners there was included in the ambit of this holding an area of bog over which the landlord exercised the right of authorizing such persons as he might select to enter and cut turf, in return for a money payment made to him. This was the only right, easement, appurtenance, or privilege that existed in relation to the bog, except the right of the tenant to take so much turf as was required for the use of the holding. On the sale to the Estates Commissioners the right of the landlord as already described passed to them by the vesting order; and on the sale by them to the tenant, whether carried out by vesting order or by fiat, the right was given to him unless it was excepted from the transfer or unless there is something to the contrary in the statute. Therefore, the 34th section of the Act of 1896 is out of the case altogether. Mr. Matheson, who appeared for persons who had been in the habit of paying the landlord for turbary on the holding, argued that this was a privilege enjoyed by them within the meaning of that section; but it is contrary to the usual meaning of words that the subject-matter of a contract of sale is given by the seller or enjoyed by the purchaser as a privilege.

The case, therefore, turns solely on the construction of sect. 21 of the Act of 1903, which provides that in the case of the sale of an estate where portion of the holding consists of bog, and the purchaser had not an exclusive right of turbary before such sale, the Land Commission may make regulations authorizing the cutting or making turf on that bog by any occupiers of land in the

Appeal. 1908.

In re King-Harman's Estate.

Holmes, L.J.

neighbourhood of the said holding, for whose requirements such turf appears to be necessary, upon such terms as to payment or otherwise as may appear to them to be just; and those regulations may confer a right to enter upon any land for the purpose aforesaid.

What do these words refer to? It is likely enough that they may authorize regulations for the exercise of the rights, easements, appurtenances, and privileges mentioned in sect. 34 of the Act of 1896, in so far as they relate to turbary; I think, however, that the primary object of the section was to enable the Land Commission at the time of sale, and as part of the terms of sale, to reserve to themselves a right to act under this section; but I am of opinion that where a sale has been completed, and all the estate and interest of the landlord without exception or reservation have been vested in the purchasing tenant, the possession and enjoyment of the latter cannot be afterwards interfered with under this section. The memorandum finds that the agreement signed by the tenant contained no reference to turbary, and that the holding has been vested in the tenant without reference to turbary.

It is said that the mode of vesting in the tenant was by fiat under sect. 32 of the Act of 1896; but the provisions of that section show that the effect is the same. I therefore hold that both questions ought to be answered in the negative.

Solicitor for the appellant: *P. C. P. M'Dermott.*
Solicitors for the adjoining tenants: *Croskerry & Son.*
Solicitor for the Treasury: *W. G. Towers.*
Solicitor for the vendor: *Norris Goddard.*

R. ST. J. C.

IN RE TODD AND M'FADDEN'S CONTRACT.

(1908. No. 46.)

Kenny, J. (*for M.R.*) 1908. Feb. 7.

Vendor and purchaser—Conditions of sale—Time for delivery of abstract and requisitions—"Immediately"—Meaning of.

Premises held under a judicial tenancy were sold subject to conditions of sale, which provided—(1) that the vendor should, immediately after the sale, furnish to the purchaser or his solicitor an abstract of title, and (2) that the purchaser should make his objections and requisitions in respect of the title, and send the same to the office of the vendor's solicitor within four days from the delivery of the abstract, and in this respect time should be of the essence of the contract.

The sale took place on 30th December, 1907; the abstract was delivered on 4th January, 1908, and the purchaser's requisitions were sent on 13th January, 1908. The vendor's solicitor declined to answer the requisitions, on the ground that they were late:—

Held, that the abstract was not delivered "immediately," and consequently not within the time specified in the conditions, and that therefore the purchaser was not bound by the condition requiring the requisitions to be furnished within four days from the delivery of the abstract.

Upperton v. *Nickolson* (L. R. 6 Ch. 436) followed.

ORIGINATING SUMMONS.

This was an application entitled in the matter of the contract dated the 30th December, 1907, for the sale of the house, mills and farm, and premises known as New Mills, situate in Glasslough, in the county of Monaghan, and made between Emily Elizabeth Todd as vendor, and Bridget M'Fadden as purchaser, on behalf of the purchaser, for a declaration that in the events which happened the requisitions delivered on behalf of the purchaser on January 13th, 1908, were delivered within a reasonable time, and that the purchaser was not, in the events which happened, precluded from having the said requisitions answered by condition 10, relied on by the vendor, and for the costs of the application.

The facts of the case were as follows:—The premises in question were held under a judicial tenancy at the rent of £60, fixed by an originating agreement dated May 23rd, 1899,

Kenny, J. 1908.

In re Todd & M'Fadden's Contract.

made between Samuel Cargill deceased, as tenant, and Sir John Leslie as landlord. The rent was subsequently reduced to £58 7*s.* 6*d.* by reason of portion of the land having been taken for the purpose of building a labourer's cottage by the Monaghan District Council. The vendor was the personal representative of Samuel Cargill, who died on June 19th, 1902, and was selling as such.

The material conditions of sale were as follows:—

5. The vendor shall, immediately after the sale, furnish to the purchaser or his solicitor an abstract of title to the said premises.

6. The title to the premises shall commence with an originating agreement dated May 23rd, 1899, made between Samuel Cargill as tenant, and Sir John Leslie as landlord.

10. The purchaser shall make his objections and requisitions, if any, in respect of the title and all matters appearing in the particulars and conditions, and send the same to the office of the vendor's solicitor within four days from the date of the delivery of the said abstract, and in this respect time shall be of the essence of the contract.

The conditions were in a printed form. Condition 5 ran thus: "The vendor shall, within days after the sale." The words "within days" were struck out, and the word "immediately" written in.

The sale took place on December 30th, 1907, when Bridget M'Fadden signed an agreement acknowledging herself to be the purchaser for the sum of £535, and binding herself to complete the purchase agreeably to the particulars and conditions of sale. The vendor resided at Bangor, in the county of Down, and the purchaser at Glasslough, in the county of Monaghan. The solicitors for both parties carried on business in the town of Monaghan.

On January 1st, 1908, Mr. James H. Ross, the purchaser's solicitor, wrote to Mr. William Martin, the vendor's solicitor, asking for the abstract of title, copy conditions of sale, searches and various other documents specified in the conditions, and for a copy of the will and probate of Wilson Cargill, deceased. On January 2nd, 1908, Mr. Martin replied, enclosing the copy will and probate asked for, and stating that he would send the other papers without delay.

On January 3rd Mr. Ross wrote returning the copy will, to have it more carefully compared; and on the same day Mr. Martin replied, stating that the copy had been carefully compared with the probate. On January 4th Mr. Martin wrote to Mr. Ross, enclosing copy conditions of sale, abstract of title, and documents to vouch; and this letter was received at Mr. Ross's office on the same day. On January 8th Mr. Ross wrote to Mr. Martin, returning the copy of the will of Wilson Cargill, and informing him that he had that day received a notice from Mr. Dunwoody, solicitor for Mr. Richard Cargill, of his intention to take proceedings for the recovery of the "Miller's field," which he was informed was comprised in the farm contracted to be sold to his client.

On January 10th Mr. Martin replied that his client repudiated entirely Mr. Richard Cargill's claim, and was prepared to indemnify the purchaser against it. On January 13th Mr. Ross wrote to Mr. Martin, enclosing requisitions on title, and requesting him to attend to them at once. On the same day Mr. Martin wrote to Mr. Ross, stating that he returned the requisitions unanswered, as they were late, and referred him to condition 10 of the conditions of sale. On January 16th the above-mentioned summons was taken out on behalf of the purchaser, and came on for hearing before Kenny, J., sitting for the Master of the Rolls, on February 7th.

Bartley, for the purchaser:—

The purchaser is entitled to a declaration that his requisitions were in time, for (1) the abstract of title was not delivered within the time specified in condition 5, namely "immediately after the sale," and therefore (2) the purchaser was not bound by the provisions in condition 10, that the requisitions shall be sent to the office of the vendor's solicitor within four days from the delivery of the abstract.

As to (1).—The insertion in writing of the word "immediately" is important, as showing that the abstract was to be delivered forthwith. "Immediately after the sale" means on the day of the sale. The abstract was not in fact delivered till January 4th. In *Reg.* v. *Berkshire Justices* (1), where the Court held that a

(1) 4 Q. B. D. 471.

Kenny, J. 1908.

In re TODD & M'FADDEN'S CONTRACT.

provision in the Licensing Act, 1874, that recognizances should be entered into "immediately after notice of appeal," had not been complied with, the recognizance not having been entered into for four days after the notice of appeal, Cockburn, C.J., says: "It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay; and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

In *Griffith* v. *Taylor* (1) the meaning of the word "immediately" in a section of the Larceny Act, 1863, which provides that a person may be "immediately apprehended" without a warrant, was discussed. Cockburn, C.J., says:— "'Immediately' is a strong word, and must, I think, be taken to mean 'then and there'; still it must receive a reasonable construction, and if arrest on the spot is impossible and can only be effected by pursuit, if the pursuit is immediately set on foot, and so the party is arrested, then I think he would be 'immediately apprehended' within the meaning of the section, although the apprehension took place, not on the spot, but at some distance from it. But then in every case it must be a question of fact whether the apprehension is 'immediate' or not."

In *Duncan* v. *Topham* (2) it was held that a contract to be performed "directly" was not the same as a contract to be performed within a reasonable time. In Com. Digest, title "Condition" (G 5) it is said: "Where a condition is to be performed immediately he shall have a reasonable time to perform it, according to the nature of the thing to be done. So if it is to be performed on demand." Blackburn, J., refers to this passage in *Toms* v. *Wilson* (3), where it was held that when, by the express terms of the instrument creating the debt, payment is to be made "immediately upon demand in writing," it must be construed to mean within a reasonable time.

(1) 2 C. P. D. 194. (2) 8 C. B. 225. (3) 4 B. & S. 454.

As to (2).—Lord Cottenham, in *Southby* v. *Hutt* (1), and James, L.J., in *Upperton* v. *Nickolson* (2), laid down that, if the vendor does not deliver his abstract within the time named, the purchaser is not bound by the condition as to time for delivery of requisitions.

These cases are referred to in the Encyclopædia of Forms and Precedents, vol. xii. (Sale of Land), where it is stated in a note as to requisitions that it is better not to fix any time for delivery of the abstract, since if this is done, and the abstract is not delivered within the time fixed, the purchaser will not be bound by the condition as to time for delivery of requisitions. Farrer on Conditions of Sale, p. 65, Williams on Vendors, p. 52, and Dart on Vendors and Purchasers (7th ed.), p. 139, contain statements to the same effect.

John H. S. Russell, for the vendor:—

I accept the meaning of the word "immediately" which has been referred to; but I submit that delivery of the abstract on January 4th was in time to satisfy the meaning of the word "immediately." The abstract was not asked for till January 1st. Even if the abstract was not delivered "immediately," the purchaser's solicitor made no objection on that score; he had plenty of time to deliver his requisition within four days; but he waited for nine days, and he must be taken to have waived this point. The observations of Kindersley, V.-C., in *Oakden* v. *Pike* (3) apply here. The Vice-Chancellor says:—"If an abstract is not delivered within the time specified, the purchaser has a right to say, 'The vendor has not performed the conditions, and therefore I repudiate the purchase.' On the other hand, if the vendor has performed the condition of delivering the abstract within the specified time, or if he has not, if the abstract were accepted and that condition waived by the purchaser, then if the purchaser does not deliver his objections, or if he does deliver his objections, if there be any objection not contained in what are so sent in, but afterwards thought of, such objections shall be considered as waived, and the

(1) 2 My. & Cr. 207. (2) L. R. 6 Ch. 436. (3) 34 L. J., Ch. 620.

Kenny, J. 1908.

In re Todd & M'Fadden's Contract.

title to that extent accepted." The Vice-Chancellor goes on to say that it has never been doubted that by such a condition as this, according to the common expression, time is made of the essence of the contract. Here there is an express provision to that effect in condition 10. *Upperton* v. *Nickolson* (1) was a different case; there no perfect abstract was delivered until after the commencement of the suit, and the purchaser had twenty-eight days after delivery of the abstract to furnish his objections.

Bartley, in reply:—

Oakden v. *Pike* (2) is not in point. There the abstract was delivered within the time, and the Judge there says:—"If the abstract were accepted and that condition waived by the purchaser." Here there was no waiver. In Prideaux on Conveyancing (19th ed.), vol. i., p. 171 (Conditions of Sale, No. 7), a condition is given which gets rid of the difficulty which has arisen here owing to a time having been provided for delivery of the abstract, by providing that whether the abstract is delivered within eight days or not, the requisitions shall be furnished within fourteen days. In Webster on Conditions of Sale (3rd ed.), p. 267, under the heading "Conditions with respect to requisitions," the author quotes *Oakden* v. *Pike* (2) as an authority for the statement that in conditions requiring a purchaser to send in his requisitions within a given period, time is of the essence of the contract, whether it is so stated or not, but goes on to say:—"If a time is fixed for the delivery of the abstract, and the abstract is not delivered within such time, the condition requiring the purchaser to send in his requisitions within a given time will not be binding, and the purchaser will be allowed a reasonable time for sending in requisitions": *Upperton* v. *Nickolson* (1). It makes no difference if the condition as to sending in requisitions contains a stipulation that time shall be of the essence of the contract, and no such stipulation is contained in the condition as to the delivery of the abstract: *Ibid.*

(1) L. R. 6 Ch. 436. (2) 34 L. J., Ch. 620.

Kenny, J.
1908.

In re TODD & M'FADDEN'S CONTRACT.

KENNY, J.:—

This is a summons under the Vendor and Purchaser Act, asking on behalf of Bridget M'Fadden, the purchaser, for a declaration that in the events which have happened the requisitions delivered on her behalf on the 13th January, 1908, were so delivered within a reasonable time, and that the purchaser is not precluded by the 10th condition of sale from having these requisitions answered.

The sale took place on Monday, December 30th, 1907, and the abstract of title was delivered on Saturday, January 4th, 1908. The purchaser's requisitions were delivered on Monday, January 13th, 1908. It was contended on behalf of the purchaser that the abstract should be deemed not to have been delivered until the 6th January, inasmuch as the solicitor for the purchaser did not personally receive it till the 6th. I shall assume, for the purpose of the argument, that there was a good delivery of the abstract on January 4th.

The 5th condition of sale provided that the vendor should *immediately* after the sale furnish to the purchaser or his solicitor an abstract of title to the said premises. The conditions were in a printed form, and this condition as it originally stood in print was as follows:—"The vendor shall within .... days after the sale furnish to the purchaser or his solicitor," &c. The words "within" and "days" were however, struck out, and the word "immediately" inserted, in writing, thereby pointedly calling the attention of the purchaser to the fact that the abstract would be delivered *immediately* after the sale. The 10th condition provided that the purchaser should send his objections and requisitions, if any, in respect of the title to the office of the vendor's solicitor within four days from the delivery of the abstract, and that in this respect time should be of the essence of the contract. Assuming the abstract to have been delivered on January 4th, 1908, more than four days elapsed before the receipt of the requisitions, which were not sent till the 13th. It was contended on behalf of the purchaser, that the word "immediately" in the 5th condition meant "forthwith," "instanter," and that the statement in the condition was equivalent to a representation that the abstract was ready and would be delivered

Kenny, J. 1908.

In re TODD & M'FADDEN'S CONTRACT.

at latest on or before January 1st, 1908. If that argument were sound, it was further contended that condition 10, so far as it prescribed a time for delivery of requisitions, was not binding upon her, that she was absolved from the provision requiring the delivery of such requisitions within four days from the delivery of the abstract, and that the matter was left at large, so far as the delivery of such requisitions was concerned, so long as they were delivered within a reasonable time.

On the first point, as to the meaning of the word "immediately," I was referred to cases which are to be found collected in the Encyclopædia of English Law, vol. 7, p. 29, as to the interpretation placed on the word where it occurs in statutes; and there can be little doubt that when used in penal enactments it receives a most rigorous construction equivalent to what is contended for by the purchaser here. The correspondence after the sale certainly suggests that the purchaser expected the abstract at once—in the sense of "forthwith"—and that there would be no delay in the delivery. I think there was delay, and that it was not delivered "immediately" within the words of the condition. Up to what period might the vendor have delayed? Would it have been a reasonably immediate delivery if she had waited for a week or a fortnight? The line must be drawn somewhere. I accede to the purchaser's argument that "immediately" means "forthwith," "instanter," and that the purchaser's solicitor might with reason say that he expected the abstract at latest on the 1st January. His letter of that date shows that he did. In my opinion, a delivery five days after the sale did not, in the circumstances of the case, satisfy the condition; and I can find nothing which would warrant me in holding that there was a waiver of the latter.

What then is the effect of the vendor's non-compliance with her own stipulation as to time? I think it is settled by the cases of *Southby* v. *Hutt* (1) and *Upperton* v. *Nickolson* (2) that if the abstract be not delivered within the time named in the conditions, the purchaser cannot be held bound to send in his objections within the time limited in the conditions for that purpose. In the former of the two cases I have referred to there was a time limit for delivery

(1) 2 My. & Cr. 207. (2) L. R. 6 Ch. 436.

of the abstract, and Lord Cottenham says (p. 211)—"The abstract of title was not delivered within the twenty-one days, so that no question arises as to time specified in these conditions of sale." In *Upperton* v. *Nickolson* (1), James, L.J., points out that Lord Cottenham's observation was not a concrete but a general one. At p. 443 of the report, James, L.J., says:—"The Lord Chancellor Cottenham, referring not to any particular case, but to the general practice, seems to have laid it down as a clear rule that, where there are conditions of this nature, the vendor must himself comply with the stipulation as to time before he can hold the purchaser bound by a similar stipulation. . . . It certainly seems to me that it would be a monstrous injustice that a man who has himself not complied with the stipulation as to the time should by his own act alter the date from which the time is to be calculated by the other side. It might happen that a vendor might take a most inconvenient time for delivering the abstract—as, for instance, when the purchaser's advisers were abroad during the Long Vacation. It seems to me reasonable and just that if the vendor does not himself comply with the terms specified, in that case the time for taking the objections, and the mode in which they are to be considered as waived, should depend upon the general principles of the Court."

It seems to me that, applying the general principles of the Court, it would be unjust to hold the purchaser here bound by the 10th condition of sale, and I therefore hold that the requisition was in time. The vendor must pay the costs of this summons.

Solicitor for the purchaser: *J. A. Ross.*
Solicitor for the vendor: *William Martin.*

W. L.

(1) L. R. 6 Ch. 436.

Appeal.
1908.
Jan. 21, 27.

IN THE MATTER OF THE ESTATE OF ANNA G. CRAMER ROBERTS AND MARMADUKE W. C. CRAMER ROBERTS (1).

Land Purchase Acts—Incumbered estate—Sale of—Vendor not entitled to receive any part of rents and profits—Tenant for life—Vendor—Bonus—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 50—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48.

The tenant for life under a settlement of a settled estate, being unable to discharge the incumbrances thereon, assigned his life interest to his wife in consideration of her undertaking to discharge the incumbrances and to indemnify him against the same. Subsequently the husband and wife, as vendors, sold the estate under the Irish Land Act, 1903:—

Held, by the Court of Appeal, reversing the decision of Wylie, J. ([1907] 1 I. R. 483), that the estate came within the definition in the proviso in sect. 48, sub-sect. 1, of the Act of 1903, and that the bonus should be added to the purchase-money.

APPEAL by Mrs. Cramer Roberts from a decision of Wylie, J., reported [1907] 1 I. R. 483, where the facts are stated. The deed of 15th August, 1901, by which Mr. Cramer Roberts assigned his life interest in the settled property to his wife, contained a recital that the lands were subject to a number of specified charges and incumbrances, and that the incumbrancers were pressing Mr. Cramer Roberts to discharge the same, which he was unable to do. The consideration for the deed was an undertaking by Mrs. Cramer Roberts to discharge the incumbrances, and to indemnify her husband against the same.

A number of additional affidavits were filed by the appellant and respondent respectively dealing with the outgoings and income of the estate at the date of the sale; but, having regard to the decision of the Court of Appeal, it is unnecessary to set out here the facts deposed to.

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Jellett, K.C., and *Darley*, for the appellant:—

Mr. Cramer Roberts had no beneficial interest whatsoever in the estate sold; he was simply donee of a power of sale which he could only exercise with the concurrence of his wife; it was never intended that one in that position should be paid the "bonus." Assuming, however, that, having regard to sect. 50 of the Settled Land Act, 1882, he was the "vendor" of the estate sold, the estate comes within the definition contained in the proviso in section 48 (1), and the bonus must be added to the purchase-money. The reason for the execution of the deed of August, 1901, was that the estate was so incumbered that the tenant for life could not discharge the incumbrances; and he therefore assigned his life estate to his wife. At that date he was not entitled, by reason of the incumbered position of the estate, to receive any part of the rents or profits for his own use; and nothing has since occurred to change that state of affairs. If, instead of executing an assignment of his life estate, he had mortgaged it, the proviso would clearly apply; and it is absurd to say that because he executed an absolute assignment, he is now entitled to the bonus. "Incumbrance" may include an absolute assignment: *Jones* v. *Barnett* (1). [They also contended that on the evidence the estate was insolvent at the date of the sale. *Bandon's Estate* (2) was also referred to.]

Ronan, K.C., *Meredith, K.C.*, and *J. H. S. Russell*, for the respondent:—

The respondent was clearly the "vendor": *Singleton's Estate* (3); *In re Jones* (4); Settled Land Act, 1882, sect. 50. That he had no beneficial interest in the estate is immaterial: Irish Land Act, 1904, sect. 3. Under the latter section the respondent is entitled to retain the bonus for his own use unless the case comes within the proviso in sect. 48 (1) of the Act of 1903. That proviso has no application to this case; it is not enough that the vendor should be not entitled to receive for his own use any part of the rents or profits: it must be because the estate is "so incumbered" that he is disentitled to receive them. Here the vendor is

(1) [1899] 1 Ch. 611.
(2) [1907] 1 I. R. 226.
(3) 40 Ir. L. T. R. 175
(4) 26 Ch. D. 736.

Appeal. 1908.

In re ROBERTS' ESTATE.

disentitled to receive the rents or profits, not because the estate is "so incumbered" that he is disentitled to receive them, but because he has assigned his entire interest to his wife. If Mrs. Cramer Roberts had claimed the bonus, or required it to be added to the purchase-money, she could have refused to concur in the sale. We contend that the proviso does not relate to sales by limited owners at all; the object was to benefit incumbrancers. The assignment of 1901 was not an incumbrance: see definition of "incumbrance" in sect. 34 of the Act of 1887, which is part of the code, and must be read with the Act of 1903. The whole matter of the bonus is an anomaly, but no apparent absurdity can affect the construction to be put upon sect. 48 (1); see judgment of Bramwell, L.J., in *Hill* v. *East and West Indian Dock Co.* (1).

Jellett, K.C., was not called upon to reply.

THE LORD CHANCELLOR:—

We do not require any further assistance from Mr. Jellett in this case. We are all of opinion that the case comes within the terms of the proviso in section 48, sub-sect. 1, and that Mr. Cramer Roberts is accordingly not entitled to the percentage.

Unquestionably, having regard to the provisions of section 50 of the Settled Land Act, 1882, Mr. Cramer Roberts was the vendor of the estate in this matter—Mr. Jellett did not dispute that—and the question for our determination is whether, being the vendor, he is deprived of the bonus under this proviso. [His Lordship read section 48, sub-sect. 1, and continued:—] The application of that section depends on the facts proved before us. It appears that by the deed of August, 1901, certain estates and property, including, I believe, all Mr. Cramer Roberts' property, were assigned by him to his wife, the present appellant, because he was unable to discharge the obligations which attached to that property; for that reason it was all assigned to Mrs. Cramer Roberts, and she from that time became entitled to receive the rents and profits, and Mr. Cramer Roberts was not entitled to receive any part thereof.

(1) 9 A. C. 448.

Appeal. 1908.

In re ROBERTS' ESTATE.

The Lord Chancellor.

The meaning of the proviso which I have read is that when the condition of the estate before the Court under the Land Purchase Act is such, having regard to the incumbrances, that the vendor is not entitled to receive any part of the rents and profits for his own use, then the percentage is to be added to the purchase-money, and is not to be paid to the vendor, the vendor being the person who, *ex hypothesi*, is entitled to sell and to receive the percentage.

As to the condition of this estate on the 15th August, 1901, when the assignment to Mrs. Cramer Roberts was executed, it is obvious that it was so incumbered, as indeed is recited in the deed itself, that the vendor was not entitled at that time to receive for his own use any part of the rents and profits thereof.

What has altered that state of affairs?

Up to the present time Mr. Cramer Roberts is not entitled under the deed to receive for his own use any part of the rents and profits because of the incumbered position of the estate. I do not think that the figures which have been discussed during the argument by both sides afford us any real light on the question which we have to decide. Those figures do not help the respondent's case in the smallest degree; and his counsel have failed to satisfy me on the figures that the estate was at the date of the sale, or now is, a solvent estate; the figures are all against that being so. Under these circumstances, the vendor not being entitled to receive any part of the rents and profits "thereof," that is of the estates before the Court, not of other estates, by reason of its being so incumbered, the case comes within the very terms of this proviso.

Mr. Ronan argued that the section has no application to a case where the vendor has no estate at all, and merely exercises a power of sale; that would be a construction which we ought to be slow to put upon the section unless we are forced to do so.

I am satisfied both from the recital in the deed of August, 1901, and from the entire circumstances of the case that this estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits, and therefore that the vendor is not entitled to the percentage. I am not going

Appeal. 1908.

In re Roberts' Estate.

The Lord Chancellor.

to stretch the construction of the section, because of the suggestion of Mr. Ronan that the whole matter of the bonus has no foundation in morals, and is incapable of being supported ethically; I do not enter into questions of that nature at all.

In the result the decision of Mr. Justice Wylie must be reversed, the appellant to have her costs out of the estate.

Fitz Gibbon, L.J.:—

I confine myself strictly to the consideration of the simple question, whether, on the facts, the "estate" sold in this matter comes within the description in the proviso in section 48 (1); if it does, Mr. Cramer Roberts, as the "vendor" of that estate, is by that proviso prohibited from receiving the "bonus," and, if payable, it must be added to the purchase-money.

As regards people who have no beneficial interest, and yet may get the "bonus," it is instructive to look at the amending Act of 1904, which disposes of it in various ways, in certain cases which seem to have been over-looked in 1903. But none of the points of morals and ethics which appear to exercise Mr. Ronan's conscience can affect the present case. The proviso enacts that a vendor who is in a certain defined position shall not get the "bonus,"—namely, a vendor who "is not entitled to receive for his own use any part of the rents and profits by reason of the estate sold being "so incumbered." The proviso points to two separate and distinct things—(1.) that the vendor is not entitled to receive for his own use any part of the rents and profits, and (2.) that this state of affairs arises from the incumbered condition of the estate; the proviso is limited to an estate being "so incumbered" that the rents and profits are not receivable by the vendor.

It is assumed here that the "bonus" is payable, and that Mr. Cramer Roberts is "the vendor"; in accepting this assumption I think that we are assuming a good deal, because it would seem that he is not solely entitled to act as vendor, and that his wife's concurrence was necessary to enable him to sell the estate.

Assuming him to be the vendor, he most certainly is not entitled to receive any part of the rents and profits. But the question remains—why is he not entitled to receive the rents

and profits? Is it because the estate is "so incumbered" that he is disentitled to receive them? The deed of 1901, by which he transferred the rents and profits to his wife, was executed because the estate was so incumbered that he could not meet his liabilities; and that deed, as well as the deed under which Mr. Shannon receives them, is in the nature of an incumbrance, and is a factor in the incumbered condition of the estate. That being so, so long as he is not entitled to go back into possession or receipt of the rents and profits, he can not be described otherwise than as the vendor of an estate which comes within the very words of the proviso, and the question must be answered in favour of the appellant.

I am glad that we have not been asked whether the "bonus" is payable, and that we have to deal only with its application. Aiding the sale of incumbered estates is within the object of the "bonus," and section 48 is express that in such cases as this the money is not to be forfeited, but that it is to be paid as an integral part of the purchase-money of the estate, to be distributed among the people entitled to it. In the present case, whoever is beneficially entitled to the estate will get it; Mr. Cramer Roberts is not entitled to it; and the appeal must be allowed.

HOLMES, L.J.:—

I decide this case on very narrow grounds. The vendor, Mr. Cramer Roberts, is not now, nor was he at the date of the sale, entitled to receive for his own use any part of the rents and profits of the estate sold. What was the reason for that state of affairs? It was not because he had made the assignment to his wife in the year 1901, but because the estate was in such an incumbered condition that he could not hold it himself, and therefore, as a means of discharging the liabilities, he passed it on to his wife.

In my judgment it is unnecessary to enter on a calculation of the outgoings and income of the estate respectively at the date of the sale, as was done by Mr. Justice Wylie. The admitted facts show that the sole cause of the transfer of the property to

Appeal. 1908.

In re ROBERTS' ESTATE.

Mrs. Cramer Roberts was that it was so incumbered that the incumbrances absorbed all the income.

Solicitors for the appellant: *Maunsell, Darley, & Orpen.*
Solicitor for the respondent: *W. J. Shannon.*

R. ST. J. C.

Barton, J. 1908.

Jan. 16, 31. Feb. 5, 17.

DUNNE *v.* DUIGNAN.

(1907. No. 87.)

Will—Charity—Gift to—Charitable purposes—Foreign missions—Validity of gift.

A testator by his will, after making certain devises and bequests, including a bequest of £100 to the parish priest and curate of K. for Masses for the repose of his soul, disposed of certain stocks, shares, and moneys, upon trust for his three sisters during their lives; and after the death of the survivor of them he directed that the trust funds should be "expended by his executors in such charities in Ireland, and in such foreign missions, as his executors, in their absolute discretion, should think fit":—

Held, that the direction that the fund should be expended in charities in Ireland and in foreign missions constituted a valid charitable bequest.

Scott v. *Brownrigg* (9 L. R. Ir. 246) distinguished.

ACTION.

By his will, dated 9th February, 1901, Edward Duignan, late of Ballasport, Hill of Down, in the County of Meath, among other devises and bequests, bequeathed the sum of £100 to the parish priest and curate of Killion, for masses for the repose of his soul, and after directing that after the payment of his debts, funeral and testamentary expenses and legacies, certain stocks, shares, and moneys, should be invested by his executors, and that out of the interest or dividends accruing from such investments his executors should pay £5 a year to his sister, Elizabeth Heavy, one of the defendants, and should pay the balance of such interest or dividends to his sisters, Catherine and Mary, the other defendants, during their lives, and the life of the survivor, and after the death of the survivor of his three sisters, Elizabeth, Catherine, and Mary, the

testator gave the following further direction :—" All the said money which shall be so invested by said executors as aforesaid, shall be expended by my said executors in such charities in Ireland, and in such foreign missions, as my said executors shall in their absolute discretion think fit."

The testator died on 26th March, 1905 ; and probate was granted on 3rd May, 1906, to the executors, the plaintiffs in this action.

The principal question arising in this action was, whether the gift in favour of charities in Ireland and foreign missions constituted a good charitable gift, or whether it was void for uncertainty.

Parol evidence was offered as to the meaning which the expression " foreign missions " bears in the Roman Catholic Church; and the Rev. Father Finlay, S.J., gave evidence on this point. His evidence is referred to in the judgment of Barton, J.

Ignatius O'Brien, K.C., and *Denning*, for the plaintiffs.

Serjeant O'Connor, K.C., and *Dudley White*, for the Attorney-General :—

Religious purposes, unless restrained by context, are charitable in Ireland. As pointed out by the Master of the Rolls, in *Arnott* v. *Arnott* (1), *Grimond* v. *Grimond* (2) was an authority on Scotch law, and has no application to Ireland. The expression " foreign missions," when used as here by a Roman Catholic, *prima facie* imports religious purposes. Even assuming it does not, in the Roman Catholic Church it has a fixed and definite meaning, and the purposes being distinctly charitable, and the testator having plainly used the expression in its technical sense, the gift is charitable. The evidence we offer is clearly admissible : *Shore* v. *Wilson* (3).

(1) [1906] 1 I. R. 127. (2) [1905] A. C. 124. (3) 9 Cl. & F. 355.

Barton, J. 1908.

DUNNE v. DUIGNAN.

Matheson, K.C., and *C. Murphy*, for two of the next-of-kin and defendants :—

The gift is void for uncertainty. A bequest for "benevolent, charitable, and religious purposes" is void : *Williams* v. *Kershaw* (1); so also a gift for "missionary purposes" : *Scott* v. *Brownrigg* (2). There is nothing here to prevent the money being expended on purposes not charitable, and, therefore, *Cussen* v. *Hynes* (3) is an authority in point. Such words as "acts of hospitality or charity," as in *Re Hewitt* (4), or "for emigration purposes," as in *In re Sidney* (5), are too wide. Parol evidence to explain the sense in which the testator used the expression "foreign missions" is inadmissible. It does not import local usage, nor has it a technical or special meaning. In cases where parol evidence has been admitted the expressions used were *prima facie* charitable, while the expression here is not. Is it probable that an ordinary testator used the expression in the sense attributed to it in the Roman Catholic Church, or that he was aware that it had any such meaning?

D. J. O'Brien, for one of the next-of-kin, and a separate defendant, supported the contention put forward on behalf of the others.

Feb. 17.

BARTON, J. :—

This direction by the testator to his executors constituted, in my opinion, a valid charitable trust. References were made, in the course of the arguments, to a passage in the judgment in *Scott* v. *Brownrigg* (2). But I need not pursue that discussion, because the words of this will are more definite, and the relevant circumstances are not the same. In the present will the words are not "missionary purposes," but "foreign missions." They occur in a charitable context in the will of a testator who had just bequeathed £100 for masses for the repose of his soul. Much ingenuity has been exercised in illustrating the indefiniteness of the word "missions," and the variety of non-charitable meanings, not con-

(1) 5 Cl. & F. 111.
(2) 9 L. R. Ir. 246, 256, 257.
(3) [1906] 1 I. R. 539.
(4) 53 L. J. Ch. 132.
(5) [1908] 1 Ch. 126.

nected with poverty, education, or religion, which the expression "foreign missions" is capable of bearing; but I cannot accede to ingenious suggestions that this testator, by the words "foreign missions" in this will and in this context, might have been contemplating such non-charitable objects as atheistical missions, or diplomatic missions, or political missions. I am of opinion that these words in this context ordinarily and naturally point to missions of an exclusively religious kind. Evidence was offered, on behalf of the Attorney-General, to the effect that the words "foreign missions" have a special meaning among Roman Catholics. The Rev. Mr. Finlay deposed that usage among Roman Catholics has attached to the words "foreign missions" a meaning which appears to embrace religious efforts of the Church, wherever those efforts are under the control of the Sacred College of the Propaganda at Rome. It has been noticed that ordinary books of reference contain similar information, with the addition that they state that the words are also used among Roman Catholics in the more familiar sense of religious missions in non-Christian countries. Subject to this qualification, which was, I think, acquiesced in, the correctness of Father Finlay's evidence was not otherwise challenged or controverted. It was suggested with plausibility that the testator, who was a farmer, was more likely to have used the words in the familiar sense than in the special sense in which they were understood by a cultured clergyman like Father Finlay. That is possible, but both meanings point to the advancement of religion, and any uncertainty of that kind would not, if the general intention was charitable, invalidate the gift, although it might possibly afford an argument for a further inquiry or for the Court lending the aid of its machinery in carrying out the trust. The Attorney-General is represented here, and those topics can, if necessary, be discussed hereafter. For the present it is sufficient to say that, without reference to the parol evidence, as to the admissibility of which I do not find it necessary to express an opinion, I have no doubt that this testator contemplated missions of an exclusively religious character, and that this trust constituted a valid charitable trust.

It was also contended that the trust fails, because it might be applied in a way which would conflict with the laws affecting

Barton, J. 1908. DUNNE v. DUIGNAN.

monastic orders. But it will presumably be applied according to law. If not, there are appropriate remedies. A trust for the advancement of religion cannot be defeated by a mere suggestion of that kind. (1).

Solicitor for the plaintiffs: *Downes.*
Solicitors for the defendants: *Mecredy & Son*; *Stapleton.*
Solicitors for the Attorney-General: *Harris & Greene.*

J. MAC M.

M. R. 1907. Dec. 19.

RUSHBROOKE *v.* O'SULLIVAN.

(1907. No. 958.)

Specific performance—Building contract—Agreement for lease in consideration of contract to rebuild and repair—Undefined works—Damages adequate compensation.

The defendant agreed to take a lease of certain premises from the plaintiff, and within twelve months from the date of the agreement to expend the sum of £600 in such substantial repairs and improvements as were mentioned in the schedule to the agreement, viz. to take down, rebuild, and repair such portion of the premises as the plaintiff's architect should direct, under his direction, and to his satisfaction. The defendant did not execute the repairs and improvements mentioned in the schedule. The plaintiff brought an action against the defendant, claiming specific performance of the agreement to rebuild and repair the premises in accordance with the terms of the agreement, and damages by reason of the defendant's failure to carry out the agreement. There was no appearance for the defendant:—

Held, that it was not a case for a decree for specific performance, but for an inquiry as to damages.

Wolverhampton Corporation v. *Emmons* ([1901] 1 K. B. 515) discussed.

MOTION FOR JUDGMENT.

This case came before the Court on a motion for judgment in default of appearance. The facts as stated in the statement of claim were as follows:—The plaintiff was owner of property at

(1) See also *Re Kenny: Clode* v. *Andrews* (97 L. T. (N. S.) 130).—[REP.]

Queenstown in the county of Cork, and the defendant resided at No. 3 East Beach, Queenstown, and carried on the business of a chemist. By an agreement dated the 31st March, 1906, made between the plaintiff and the defendant, the plaintiff agreed to let, at the rent of £84 per annum, the dwelling-house, shop, and premises situate and known as No. 3 East Beach, Queenstown, in the county Cork, to the defendant; and the defendant covenanted and agreed with the plaintiff within twelve months from the date thereof to spend upon the premises the sum of £600 in execution of certain repairs and improvements as set forth in the second schedule to the agreement; and, upon completion of the repairs and improvements as by the agreement provided, the plaintiff agreed with the defendant to forthwith grant to him a lease of the premises for the term of sixty-five years, from the 25th March, 1906, at the yearly rent of £84, payable half-yearly. The defendant utterly failed, neglected, and refused to carry out his contract with the plaintiff to expend the sum of £600 on the repairs and improvements set forth in the second schedule to the agreement within the time limited thereby, namely, the 31st March, 1907, as he was bound and required to do, notwithstanding the repeated verbal applications that were made by the plaintiff's agent to the defendant to commence, carry out, and complete the said improvements and repairs. The plaintiff, again, by letter dated 31st May, 1907, requested the defendant to proceed with and complete his contract with him; but up to the date of the issue of the writ in the action (October 3rd, 1907), no steps were taken to carry into execution the terms of the agreement.

The plaintiff was always ready and willing that the defendant should complete and carry out his contract, and upon the completion of the same to grant a lease to the defendant upon the terms and in the manner provided by the said agreement. The defendant was in possession of the premises by himself as from the 31st March, 1906, and since which time the full rent reserved by his aforesaid agreement had not been paid by the defendant to the plaintiff, but only a sum on account.

The plaintiff claimed—(1) Specific performance of the agreement dated 31st March, 1906, for the repairing and improving of the premises known as No. 3 East Beach, Queenstown, in

M. R. 1907.

RUSHBROOKE v. O'SULLIVAN.

accordance, with the terms of the agreement. (2) Damages by reason of the defendant's failure to perform and carry out the terms of the agreement for the repairing and improving of the premises. The contents of the second schedule were as follows:— To take down, rebuild, and repair such portion or portions of the said premises as said architect shall direct under his directions and to his satisfaction; and if the said premises are so completed within the time aforesaid, said landlord will reduce said yearly rent of £84 to the yearly rent of £42, also, if the said premises are so completed as aforesaid, said landlord will allow six months' rent for non-occupation during rebuilding but not otherwise.

The Hon. Cecil Atkinson, for the plaintiff:—

There is no appearance for the defendant. It is submitted that plaintiff is entitled to a decree for specific performance in the terms asked for: *Wolverhampton Corporation* v. *Emmons* (1); Fry on Specific Performance (4th ed.), p. 43.

THE MASTER OF THE ROLLS:—

I do not see my way to make an order for specific performance in this case. The views of Courts of Equity as to enforcing covenants to build and covenants to repair have not always been consistent. In earlier days the Courts of Equity appear to have specifically enforced such covenants. Sir Edward Fry, in his book on Specific Performance, section 98 (4th ed.), p. 41, states that "in some old cases, the Court of Chancery entertained suits in respect of building contracts: and what has been considered one of the earliest traces of the jurisdiction in specific performance is a dictum of Genney, J., in the 8 Edward 4, that a promise to build a house would be specifically enforced. Lord Hardwicke also maintained this view of the jurisdiction of the Court. But it is now clearly settled that, subject to certain exceptions, the Court will not specifically enforce contracts to build or repair, both because specific performance is 'decreed only where the party wants the thing in specie, and cannot have it any other way,' and because such contracts are for the most part so uncertain that the

(1) [1901] 1 K. B. 515.

Court would be unable to enforce its own judgment." The case of *Wolverhampton Corporation* v. *Emmons* (1) gives judicial sanction to the statement of the eminent text writer, and, while recognizing the general rule, affords a notable illustration and example of the class of cases in which the Courts have recognized exceptions from the general rule.

What were the facts of that case? [The Master of the Rolls referred to the report and continued.] It is plain that the determining factor in the decision of that case was the "subsequent agreement," the "supplemental agreement," by which, as Cotton, L.J., says (at page 524), "the buildings to be erected were specifically defined in all particulars." This is plain from the judgments of the Master of the Rolls and the Lords Justices.

The Master of the Rolls says (at page 522):—

> "The authorities to which reference has been made appear to me to show that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by Courts of Equity in relation to such matters, specific performance ought to be ordered."

Collins, L.J., says (at page 524):—

> "Whatever the exact principle of equity on the subject may be, I think it is clear on the authorities that the elements exist in this case which in previous cases of the kind have been held to justify the Court in making a decree for specific performance. In this case land was conveyed to the defendant by the plaintiffs, part of the consideration being the covenant by him to erect buildings on it; by the subsequent agreement the buildings to be erected were specifically defined in all particulars; and, having regard to the circumstances and the position of the plaintiffs, it appears to me that damages would not be an adequate compensation to the plaintiffs for the breach by the defendant of his contract. I think, therefore, that this is a case in which the Court has power to make an order for specific performance, and in which such an order ought to be made."

(1) [1901] 1 K. B. 515.

M. R. 1907.

RUSHBROOKE v. O'SULLIVAN.

Romer, L.J., says (at page 524) :—

> "There is no doubt as a general rule the Court will not enforce specific performance of a building contract, but an exception from the rule has been recognized. It has, I think, for some time been held that, in order to bring himself within that exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot be adequately compensated for the breach of contract by damages."

The present case does not fall within the class of exceptional cases. It fails because there are no plans, particulars, or specifications. The contract is "within twelve months from the date of the agreement to expend the sum of £600 at the least in such substantial repairs and improvements as are mentioned in the second schedule hereto of and in the said messuage, hereditaments, and premises described in the first schedule hereto, and in such manner as the landlord or his architect or surveyor shall approve or direct, and shall prove such expenditure as aforesaid to the satisfaction of the landlord or his architect or surveyor." The repairs and improvements mentioned in the second schedule are these: "To take down, rebuild, and repair such portion or portions of said premises as said architect shall direct under his directions and to his satisfaction." Where is there anything definite in that? Where is there any plan showing the particulars of the work to be done, such as was held to have been arranged and agreed upon in *Wolverhampton Corporation* v. *Emmons* (1)? Could anything be less definite than this schedule? If the plaintiff's architect had before action brought made out his plans and specifications, and had said: "There is what you must do: you must take down here; you must rebuild and repair there," then *Wolverhampton Corporation* v. *Emmons* (1) would apply; but personally I am not disposed to extend the class of exceptions

(1) [1901] 1 K. B. 515.

further than it has been extended. I agree that the question is a most difficult one; it must often be a matter of the utmost delicacy for the Court to determine how far it will go in granting specific performance of a covenant to build or repair; but in the present case I am clear that the exact nature of the work to be done has not been so specifically defined or ascertained as to justify a decree for specific performance.

M. R. 1907. RUSHBROOKE v. O'SULLIVAN.

The plaintiff is entitled to judgment on the pleadings for the breach by the defendant of his covenant; but the remedy lies in damages and in damages only. There will be judgment for the plaintiff with costs, and an inquiry as to damages. I hope that the judgment of the Court will not be misinterpreted by the defendant; he is mistaken if he thinks he will escape his liability.

Solicitors for the plaintiff: *Allen & Son.*

W. L.

IN THE MATTER OF THE ESTATE OF THE RIGHT HON. EVELYN, VISCOUNTESS DE VESCI AND OTHERS.

Wylie, J. 1908. Jan. 20, 23.

Settlement—Lands subject to perpetual annuity—Purchase of annuity by tenant for life—Part payment by mortgage of annuity—Beneficial interest in annuity—Irish Church Act, 1869 (35 & 36 *Vict. c.* 90), *s.* 34, *sub-s.* 8.

In 1878 the Commissioners of Church Temporalities in Ireland, pursuant to the provisions of sect. 34 of the Irish Church Act, 1869, and in consideration of the sum fixed by the statute as the purchase-price, assigned a perpetual annuity, which had become vested in them by virtue of the Irish Church Act, to the owner of the lands on which the annuity was charged, who was entitled to the said lands as tenant for life. Portion of the purchase-price was paid in cash by the tenant for life, and the balance was secured by mortgage of the annuity to the Commissioners, without imposing any burden on the said lands:

Held, that the tenant for life was absolutely entitled to the annuity, subject to the mortgage.

QUESTIONS OF LAW submitted by the Examiner to the Judicial Commissioner for his decision. From the memorandum of the Examiner the following facts appeared:—

By indenture, dated the 10th August, 1779, and made

Wylie, J. 1908.

In re De Vesci's Estate.

between the Trustees and Commissioners of the First Fruits payable out of Ecclesiastical Benefices first part, the Right Hon. William Henry, Earl of Clermont second part, and Rev. James Eastwood third part, the Earl of Clermont granted to James Eastwood and his successors, perpetual Curates of the Parish of Ballymascanlan, an annuity of £20 (equivalent to £18 9*s.* 2*d.* present currency) issuing out of and charged upon the manor, towns, and lands of Ballymascanlan, situate in the county of Louth. The lands sold in this matter formed portion of the lands comprised in the manor of Ballymascanlan. By deed-poll, dated 5th April, 1878, the Commissioners of Church Temporalities in Ireland, in whom the said annuity was then vested, in consideration of £109 13*s.* 5*d.*, paid by the Right Hon. Thomas, Baron Clermont, and the further sum of £305 6*s.* 7*d.*, secured by mortgage of even date, hereinafter mentioned, granted the said annuity to Baron Clermont to hold same to him, his heirs, and assigns for ever.

By indenture of mortgage, dated 5th April, 1878, and made between the Right Hon. Thomas, Baron Clermont of the one part and the Commissioners of Church Temporalities of the other part, Baron Clermont granted the said annuity to the Commissioners, their successors, and assigns, to secure payment of the sum of £305 6*s.* 7*d.*, with interest thereon, by sixty-four half-yearly instalments of £8 10*s.* each. At the date of the deed-poll and mortgage aforesaid the Right Hon. Thomas, Baron Clermont was tenant-for-life of the manor of Ballymascanlan under the limitations of a settlement created by the will of the Right Hon. William Charles, Viscount Clermont, who died on the 25th June, 1829.

By his will bearing date 25th July, 1882, the Right Hon. Thomas, Baron Clermont, after bequeathing certain specific and pecuniary legacies, disposed of portion of his personal estate in the words following :—" Subject to the payment of my said debts and the legacies aforesaid, and to the payment of any other legacies which I may hereafter bequeath by any codicil or codicils to this my will, I give and bequeath all money which at the time of my death shall be standing to my credit in any bank in England or Ireland, or invested in the public funds, or any other

security, to the trustees of this my will hereinafter named in trust, after the payments aforesaid, to invest in Government Stock the residue of such money as shall not have been invested, and to pay the interest thereon to my dearest wife for her life, and after her death to hold the principal of such residue and the securities therefor in trust for my niece, Martha Stewart, for her sole and separate use." The testator then bequeathed divers annuities, and subject thereto devised all his real and freehold estates, and all other the lands and hereditaments of which he was seized or entitled to, to James, Marquis of Ormonde, and Owen Wynne, their heirs and assigns, to the uses following, namely, to the use of Chichester, Lord Carlingford for life, with divers remainders to the issue of the said Chichester, Lord Carlingford, and in default of such issue to the use of Martha Stewart for life, with remainder to the use of her child or children for such estate and in such manner as she should by deed or will appoint, with divers remainders over in default of appointment; and in default of such issue of the said Martha Stewart, the testator then by his said will devised and bequeathed the residue of his real and personal property not thereinbefore devised and bequeathed to the said Chichester, Lord Carlingford, his heirs, executors, administrators, and assigns. The testator made five codicils to his said will whereby he bequeathed divers pecuniary legacies and annuities which he charged upon his real estates. On the 29th July, 1887, the said Right Hon. Thomas, Baron Clermont died, and probate of his said will and codicils was duly granted to the Right Hon. Chichester, Baron Carlingford, Owen Wynne, and the Very Rev. Henry Stewart, the executors therein named. On the 30th Jan., 1896, the said Baron Carlingford died, and probate of his will was duly granted to Henry Chichester Tisdall and James M'Martin, the executors therein named. The said Very Rev. Henry Stewart had since died, and the said Owen Wynne was now the surviving executor of the will of the said Baron Clermont.

The said Baron Carlingford died without having had any issue, and by deed-poll, dated 23rd March, 1899, the said Martha Stewart appointed that, subject to her life estate therein, all the lands, tenements, hereditaments, and premises over which she had a power of appointment under the said will of the said Baron

Wylie, J. 1908.

In re De Vesci's Estate.

Clermont should be and remain to the use of her son, Edward Hamilton Stewart, his heirs and assigns for ever.

Upon the death of the said Baron Clermont, the said Baron Carlingford succeeded him as tenant for life of the said manor of Ballymascanlan; and on the death without issue of the said Baron Carlingford, the vendors became entitled to the said manor. The half-yearly instalments aforesaid had been regularly paid by the vendors and their predecessors in title. Inasmuch as the form of final schedule of incumbrances necessarily depended on whether the said annuity of £20 (Irish) was to be placed thereon as an existing charge to be redeemed, or was to be treated as merged, the Examiner submitted the following questions to the Judicial Commissioner:—

1. (*a*) Was the said Right Hon. Thomas, Baron Clermont entitled beneficially to the said annuity of £20 (Irish), subject to the said mortgage of 5th April, 1878? and, if so (*b*), was the said annuity now vested, subject to the said mortgage, and to such legacies and annuities as were charged thereon by the will of the said Baron Clermont, in Martha Stewart and Edward Hamilton Stewart, as tenant for life and absolute owner in remainder respectively?

2. Was the effect of the purchase by the said Baron Clermont of the said annuity to vest same in him as a trustee for the benefit of the inheritance, and not otherwise?

3. Was the effect of the said purchase to merge the said annuity in the inheritance, save in so far as same might be deemed still to exist by way of security for the instalments of the purchase-money, and might the redemption of the said annuity be accordingly dispensed with when the claim on foot of said mortgage was placed upon the final schedule?

4. If either of questions 2 or 3 were decided in the affirmative, was the said Baron Clermont entitled as against the inheritance to be recouped in respect of—(*a*) the said sum of £109 13*s.* 5*d.*, cash paid by him; (*b*) the proportion of the instalments paid by him on foot of said mortgage, which represented principal; (*c*) interest on either of said claims?

5. If either of questions 2 or 3 were decided in the affirmative, was the said Right Hon. Chichester, Baron Carlingford entitled, as against the inheritance, to be recouped in respect of (*a*) the

proportion of the instalment paid by him on foot of the said mortgage, which represented principal; (*b*) interest on the amount so paid?

R. H. Macrory, for the vendors:—

Two questions arise—(1) whether Lord Clermont could purchase except for the benefit of the estate; and (2) who is the person to whom the redemption-price of the annuity should be paid? As tenant for life Lord Clermont was in a fiduciary position as regards the estate: *Hill* v. *Brown* (1); see also *Griffith* v. *Owen* (2). The question of how far his position is fiduciary depends on the nature of the transaction and the surrounding circumstances: *In re Ely's Estate* (3), and the judgment of Ross, J. In this case the tenant for life had an option to purchase, and purchased the annuity at a price less than what might have been got in the open market, *i.e.* the price named in sect. 34 of the Irish Church Act, 1869 (34 & 35 Vict. c. 90). Under sub-sect. 8 of that section the tenant for life is an owner, as defined by the Landed Property (Ireland) Improvement Act, 1860 (23 & 24 Vict. c. 153). Mines and quarries are put in the same position as fee-farm rents. Both are first to be offered to the owner. It was clearly intended that mines and quarries should go with the inheritance. It can never have been intended that a limited owner should be able to retain what he has purchased for his own benefit, and at the same time be able to charge the lands with the purchase price, as he is enabled to do by sect. 34, sub-sect. 8.

Hewitt R. Poole, for Mrs. Martha A. Stewart and Rev. Edward Hamilton Stewart:—

This annuity is clearly alive for some purposes. Lord Clermont was a mortgagor *sub modo*; at the time of the purchase the annuity became his property. He did not avail himself of the provisions of section 34, sub-sect. 8, by which he could, as limited owner, have raised the amount necessary for the purchase by mortgage of the lands, but instead paid portion of the purchase price in cash,

(1) Dru. *temp.* Sugden, 426. (2) [1907] 1 Ch. D. 195.
(3) [1904] 1 I. R. at p. 85.

Wylie, J. 1908. *In re* De Vesci's Estate.

and raised the balance by mortgage of the annuity. A burden was not sought to be imposed on the estate, and the annuity was purchased at a price fixed by the statute. No question of election could arise until such time as the same person might become entitled to the lands and to the annuity. There is nothing in the statute to suggest that the limited owner is to hold upon trust what he has purchased, and the purchase in no way enures for the benefit of the settled land.

Garrett Walker, K.C., for the executors and trustees of the will of Thomas, Baron Clermont, and of the will of Baron Carlingford:

Mr. Macrory's clients can only claim on the terms that Lord Clermont's estate is to be recouped to the extent of the amount paid by him for the annuity. *In re Ely's Estate* (1) contemplated a benefit accruing to a tenant for life by reason of the fact that he occupied that position. The words of section 34, sub-sect. 8, show that the transaction contemplated by the section is one to be entered into by the limited owner provided that he can thereby benefit the estate. The clauses following sub-sect. 8 emphasize this view. If the annuity was bought for the benefit of the estate—as a burden was not imposed on the estate—Lord Clermont's executors are entitled to get back what Lord Clermont actually paid in respect of it, and Lord Carlingford's estate is entitled to be recouped to the extent of the instalments actually paid by him during his life: *In re Leinster's Estate* (2).

Jan. 23.

Wylie, J.:—

Under the Irish Church Act, 1869, the Commissioners of Church Temporalities in Ireland became entitled to a perpetual annuity of £20 (Irish), equivalent to £18 9*s.* 2*d.* present currency, payable out of (amongst others) the lands sold in this matter, and by section 34 of said Act they were empowered to sell any property vested in them by the Act by public auction or private contract, subject to certain conditions, one of which was that they should not sell to the public any perpetual rent issuing out of

(1) [1904] 1 I. R. 66. (2) 23 L. R. Ir. 152.

any land, where the fee-simple of the land was vested in some person other than the Commissioners, until they had offered to sell it to the owner of the land at twenty-five years' purchase, and the owner had declined to accept the offer. Sub-section 8 of sect. 34 provides that "owner of land" shall include a "limited owner" as defined by the Landed Property (Ireland) Improvement Act, 1860. Accordingly, by deed poll of the 5th April, 1878, the Commissioners, in consideration of £109 13*s.* 5*d.* paid to them by Baron Clermont, and a further sum of £305 6*s.* 7*d.*, secured by a mortgage of even date, granted the said perpetual rent to Baron Clermont, his heirs and assigns, and by said mortgage of even date Baron Clermont regranted the said perpetual rent to the Commissioners to secure payment of said sum of £305 6*s.* 7*d.* with interest, by sixty-four half-yearly instalments of £8 10*s.* each. At the date of purchase Baron Clermont was tenant for life of said lands, and "limited owner" within the meaning of section 34, sub-sect. 8, and that sub-section empowered any limited owner to raise the money required for any such purchase or any part thereof by mortgage of the land of which he was such limited owner.

The question submitted to me by the Examiner for my decision is, Was Baron Clermont entitled beneficially to the said annuity or rent of £20 (Irish) subject to the said mortgage of the 5th April, 1878? Now, Baron Clermont, as limited owner, was by the Act entitled to buy at the statutory price, and though, as such limited owner, he was empowered by the Act to raise the amount required, or any part of it, by a mortgage of the land, he did not do so, but paid the cash portion of the price out of his own moneys, and secured the balance by a mortgage of the rent after it had been conveyed to him, and did not impose any burden on the lands. If Baron Clermont were a stranger to the estate, it is, of course, admitted he would be beneficially entitled to the rent; but it is contended on behalf of the vendors that the principle of equity, which prevents a trustee from buying in or dealing in any way with the trust estate for his own benefit, applies to a tenant for life. Now, it is well settled in *Dicconson* v. *Talbot* (1) that a tenant

(1) L. R. 6 Ch. App. 32.

Wylie, J. 1908. *In re* De Vesci's Estate.

for life, though his consent is necessary to the sale, may buy the trust estate from the trustees. Lord Justice Mellish, in that case, at page 39, lays it down that "The tenant for life was in no sense a trustee for the remaindermen." No doubt, as stated in Lewin on Trusts, "An opinion has been expressed by a high authority that a tenant for life stands in such a confidential relation towards the remainderman that he cannot as against him hold an incumbrance for more than he gave for it." But whatever may have been the ground on which that opinion was based, I do not think it can apply to this case. There was no bargaining here as to the price. The price was fixed by statute, and the limited owner was entitled by the Act to buy at that price; and I see nothing in the Act sufficient to indicate that he was to buy in the character of a trustee. If that had been the intention of the Legislature, it would have been easy to say so. I will, therefore, answer question 1 (*a*) in the affirmative. As all the parties are agreed, I will answer question 1 (*b*) in the affirmative. I answer questions 2 and 3 in the negative. Having regard to the foregoing answers, it is unnecessary to answer questions 4 and 5.

Solicitors for the vendors: *S. S. E. Reeves & Sons.*

Solicitor for Mrs. Martha A. Stewart and Rev. Edward Hamilton Stewart: *R. H. Beauchamp.*

Solicitors for the executors and trustees of Lord Clermont's will, and of Lord Carlingford's will: *Dix & Son.*

J. E. W.

GAW *v.* BRITISH LAW FIRE INSURANCE CO.

Ross, J.
1907.
Nov. 4, 14.

Appeal.
1908.
Jan. 29, 30.
Feb. 13.

Arbitration—Policy of insurance—Condition making arbitration and award a condition precedent to liability on the part of insurers—Differences—Fraud.

A policy of insurance against fire contained conditions—(*a*) that fraud on the part of the insured should cause a forfeiture of all benefit under the policy; (*b*) that all differences arising out of the policy should be referred to arbitration, and the obtaining of the award should be a condition precedent to any liability or right of action against the insurers in respect of any claim for any loss or damage, or in respect of any other matter in difference.

Insured property having been damaged by fire, a claim was duly sent in, and arbitrators were duly appointed. The award found that the claim was fraudulent, and all benefit under the policy was forfeited.

In an action to set aside the award, or, in the alternative, for an account of what was due under the policy, the evidence given at the trial consisted of the policy of insurance, some correspondence prior to the arbitration not referring to any charge of fraud, and the award. Some documents which, in the opinion of the Court of Appeal, indicated a case of fraud, were before the arbitrators, and were admitted, apparently without proof or objection, before Ross, J., and in the Court of Appeal:—

Held, by Ross, J., that the right of the plaintiff to have the question of fraud decided by the Court was not ousted by the conditions in the policy.

Held, by the Court of Appeal, that the issue of fraud was a difference arising out of the policy; that the principle of *Scott* v. *Avery* (5 H. L. Cas. 811) is not limited to an ascertainment of pecuniary loss, but makes an award respecting all differences under such a condition a condition precedent to the maintenance of an action; that the plaintiff was therefore bound by the award against him, and could not sue upon the policy.

THE plaintiff, a cycle dealer, carrying on business in Belfast, insured his premises and stock with the defendant company in the sum of £400.

The policy of insurance was dated 11th April, 1905; and in it were incorporated conditions of which the following are material:—

> 2. On the happening of any loss or damage, the insured shall forthwith give notice thereof in writing to the Company, and shall, within thirty days, or such further time as the Company may allow, deliver to

Ross, J.
1907.

GAW
v.
BRITISH LAW FIRE INSNCE. CO.

the Company a claim in writing, containing as particular an account as may be reasonably practicable of the several items of property and articles destroyed or damaged, and of the amount of the loss or damage thereto respectively, and shall give to the Company such further particulars, proofs, and information as may be reasonably required; and if such a claim be not so delivered, and such requirements be not complied with, the Company shall not be liable for any loss or damage; and if the claim be in any respect fraudulent, or any fraudulent devices are used by the insured, or anyone acting on his behalf, to obtain any benefit under this policy, all benefit thereunder shall be forfeited.

6. All differences arising out of this policy shall be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in writing by each of the parties in difference, and in case the arbitrators disagree, to the decision of an umpire, to be appointed in writing by the arbitrators before entering upon the reference; and the obtaining of the award of such arbitrator, arbitrators, or umpire, as the case may be, shall be a condition precedent to any liability or right of action against the Company in respect of any claim for any loss or damage, or in respect of any other matter in difference.

On 19th August, 1905, portion of the plaintiff's stock was destroyed, and the remaining portion injured by fire. The plaintiff furnished to the defendant company a claim setting out particulars of damage amounting to £422. Correspondence having taken place between the parties, but no settlement having been effected, the matter was referred to arbitration, and two arbitrators and an umpire were duly appointed. A draft submission to arbitration was prepared on behalf of the plaintiff, limiting the action of the arbitrators to merely ascertaining the sum properly payable to the plaintiff, but none was executed, the assessors for the defendant company stating in the correspondence that the policy conditions were in themselves a sufficient submission to arbitration.

The arbitrators, by their award, dated 18th October, 1905, reciting, *inter alia*, that the reference had come on for hearing before the arbitrators and umpire on the 18th October, 1905, in the presence of the claimant, with his counsel and solicitor, and in the presence of the solicitor and assessor for the insurance company, they, the arbitrators, did find and award that the said claim of the said James Gaw was fraudulent in a material respect, and

that fraudulent devices had been used by the said James Gaw, or some person acting on his behalf, for the purpose of obtaining a benefit under the said policy; and they accordingly found that the said James Gaw had forfeited all benefit under the said policy, and was not entitled to recover any sum in respect of his said claim.

The plaintiff, by his statement of claim, alleged that the said award of the arbitrators did not determine the question submitted to them for their decision, and purported to decide matters not submitted to them for their decision, and dealt with matters outside the terms of the reference to the said arbitrators, and that the said arbitrators in making the said award acted in excess of their authority, and claimed that the said award should be declared void, and, if necessary, set aside; and that the defendant company should be ordered to proceed to an arbitration under the said policy pursuant to the conditions, or in the alternative, that an account should be taken of the amount due to the plaintiff on foot of the said policy of insurance and payment of the same.

The defendants, by their statement of defence, denied that the arbitrators in making their award acted in excess of their authority, and submitted that the award was good and valid in every respect, and could not be impeached, and that the plaintiff was bound thereby. The evidence given at the trial consisted of the policy of insurance, the correspondence, and the award.

S. L. Brown, K.C. (with him *J. M. Whitaker*), for the plaintiff:—

The arbitrators exceeded their jurisdiction in going into the question of fraud. The decision in *Scott* v. *Avery* (1) is explained and limited in *Edwards* v. *Aberayron Mutual Ship Insurance Society* (2); see also *Russell* v. *Russell* (3). The arbitrators when they sat raised a question going to the root of the matter, as to which no "difference" had previously arisen. I ask the Court to put the plaintiff in the position he would have occupied, had he known that a question of fraud would be raised.

(1) 5 H. L. Cas. 811. (2) 1 Q. B. D. 563. (3) 14 Ch. D. 471.

Ross, J.
1907.
GAW
v.
BRITISH LAW FIRE INSNCE. CO.

A. F. Blood, K.C. (with him *Ronan, K.C.*, and *Robert Doyle*), for the defendants:—

The arbitrators had jurisdiction to consider a question of fraud; clauses 2 and 6 of the conditions, which are expressly incorporated in the agreement to indemnify against loss by fire, clearly point to fraud and fraudulent devices as matters of difference that may arise at the arbitration. If the arbitrators had power to consider a question of fraud, they had power, under condition 6, to award that, on account of fraudulent devices, all benefit under the policy had become forfeited. Counsel for the claimant appeared at the arbitration, and, when fraud was charged, did not ask for any adjournment or make any protest. There is no authority for the proposition that when a question of fraud is raised the authority of the arbitrators is ousted. The decision in the case of *Edward* v. *Aberayron Mutual Ship Insurance Society* (1) cannot be accepted as a limitation of the higher tribunal in *Scott* v. *Avery* (2). In *Russell* v. *Russell* (3), the question before the Court was, whether the action should be stayed, and the questions at issue referred to arbitration under the Common Law Procedure Act, pursuant to an arbitration clause in the partnership articles; and Jessel, M.R. (p. 476), expressly guarded himself against being taken as deciding that a question of fraud could not be decided by arbitrators. On motions of that kind the Court has a discretion in the matter; but the only question raised by the pleadings here is whether the arbitrators had power to go into the question of fraud; and, in an action to set aside the award on the ground that they had no such power, the Court has no discretion such as would arise on a motion to stay under the Common Law Procedure Act, but must give effect to the agreement to refer all questions, including that of fraud, unless the jurisdiction of the Courts is ousted. It is not alleged that the arbitration was irregularly or improperly conducted.

Ronan, K.C.:—

Scott v. *Avery* (2) decided that it is competent to the parties to make an agreement that no cause of action shall accrue, except on

(1) 1 Q. B. D. 563. (2) 5 H. L. Cas. 811. (3) 14 Ch. D. 471.

the award of an arbitrator, which is a condition precedent. Where there is no clause, stating that the obtaining an award is a condition precedent to action, the Court would have discretion as to who should try the fraud ; but the clause is in the conditions here, and therefore the plaintiff has no cause of action till he gets his award.

J. M. Whitaker, in reply :—

The question of forfeiture could not arise till after award ; there was nothing on which the forfeiture could operate till an award was made : therefore the arbitrators went beyond their jurisdiction in declaring a forfeiture. No differences arose between the parties as to fraud until after the arbitrators sat ; therefore, they had only jurisdiction to decide the matters then in dispute between the parties : namely, the matter as to amount, and not any matter subsequently arising. The arbitrators might, if necessary, have had a subsequent arbitration as to the fraud.

Ross, J. :— Nov. 14.

The plaintiff is a cycle dealer and repairer carrying on business in Belfast.

By a policy of insurance dated 11th of April, 1905, the defendant company insured the plaintiff against loss by fire in the sum of £400 on stock and utensils in trade. There are other conditions embodied in the policy, to which I shall afterwards refer.

On the 19th August, 1905, portion of the stock was destroyed, and the remaining portion injured by fire. A claim was furnished, setting out in detail the particulars of the loss. In the correspondence that ensued it was admitted that substantial damage had been caused by fire ; but a difference arose between the plaintiff and the defendant company as to the amount of the damage.

Under the conditions of the policy an arbitration was necessary as a condition precedent to any suit or action. The arbitrators on each side met on 18th October, 1905. In the correspondence there was nothing to lead the plaintiff to believe that there was anything in dispute save the amount of the damage. In the condition embodied in the policy there is a clause to the effect

Ross, J. 1907. GAW v. BRITISH LAW FIRE INSNCE. CO.

that if the claim should be in any respect fraudulent, or any fraudulent devices be used by the insured or anyone acting on his behalf to obtain any benefit under this policy, all benefit thereunder should be forfeited.

This clause was relied on before the arbitrators. It was contended that a fraudulent claim had been put forward in respect of part of the goods insured. The arbitrators promptly decided that this had occurred. They therefore awarded the plaintiff nothing, on the ground that a forfeiture of the policy had taken place in consequence of the fraudulent claim.

It is no part of my duty at this stage to say whether this contention was well founded or not; and I express no opinion on it whatever. One thing I must say, and it is this, that it is contrary to justice to allow a man to go into arbitration believing that the only question is one of amount, and then to spring upon him the charge of fraud without previous notice.

It has been contended on behalf of the plaintiff that the question of a fraudulent device in a claim is not a difference arising out of the policy, and was therefore outside the scope of the reference altogether. It is not necessary for me to express any opinion on this contention, having regard to the view I take of the case. What I have to decide is whether the plaintiff was bound to go into the question of fraud raised before the private tribunal and to be bound by their decision, and whether he was debarred from having his case heard by the ordinary Courts of the country. Now, as regards the amount of his loss, I think he had no cause of action, until the arbitrators have ascertained the amount of it by their award. But as regards the question of forfeiture by reason of fraud, how does the matter stand ?

While the decision of *Scott* v. *Avery* (1) is accepted by all Courts, the language of Lord Campbell in his judgment goes much further than was necessary, and has given rise to a good deal of misconception and confusion. It is calculated to create an impression that where an agreement to refer all differences exists, accompanied by words indicating that an award is a condition precedent to legal proceedings, a party can be forced before the

(1) 5 H. L. Cas. 811.

private tribunal, no matter what the nature of the differences may be. The matter is cleared up by the judgment of Lord Esher in *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1): "The true limitation of *Scott* v. *Avery*" (2), he says, "seems to me to be . . . . that if parties to contract agree to a stipulation in it, which imposes, as a conditional precedent to the maintenance of a suit or action for the breach of it, the settling by arbitration, the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, *i.e.*, which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration, but a stipulation in a contract, which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained . . . . The rule is founded on public policy. It in no way prevents parties from referring disputes which have arisen to arbitration; but it does prevent them from establishing, as it were, before they dispute, a private tribunal which may act in contravention of the most elementary principles of the administration of justice."

This decision has been mentioned with approval by many Courts both in this country and in England. It establishes this, that it is still the law that parties cannot by contract oust the jurisdiction of the Courts in all cases.

In the words of Mr. Justice Coleridge in *Scott* v. *Avery* (2): "The Courts will not enforce or sanction an agreement which deprives the subject of that resource to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties."

The right to meet a charge of fraud before the King's public tribunals is a right that no man can part with against his will. This award purports to deprive the plaintiff of that right and cannot be allowed to stand. The proper course for the arbitrators to have adopted, was to find the amount of the loss in fact, and leave

(1) 1 Q. B. D. 563, at p. 596. (2) 5 H. L. Cas. 811.

Ross, J.
1907.
GAW
v.
BRITISH LAW FIRE INSNCE. CO.

the plaintiff to enforce his award in a court of law. In answer to his claim it is open to the defendants to prove the fraud they allege. The only valid order I can make in this suit is to set aside and cancel the award, leaving the plaintiff to take such further steps as he may be advised. The defendant company must pay the costs of the action.

D. M. S.

Appeal.
1908.
Jan. 29, 30.
Feb. 13.

The defendant company appealed (1).

Ronan, K.C., A. F. Blood, K.C., and *Robert Doyle*, for the appellants.

S L. Brown, K.C., and *J. M. Whitaker*, for the respondent.

The judgment of the Court of Appeal was delivered by—

Feb. 13.

HOLMES, L.J.:—

This action originated in an insurance against fire effected by the plaintiff with the defendant Company, by a policy which contained a condition that all "differences arising out of the policy shall be referred to the decision of two arbitrators, one to be appointed in writing by each of the parties in difference . . . and the obtaining the award of such arbitrators . . . shall be a condition precedent to any liability or right of action against the Company in respect of any claim for any loss or damage, or in respect of any other matter in difference." A fire took place after the insurance; and a claim was made by the plaintiff in respect of the loss alleged to be sustained thereby for more than the full sum insured. There followed some correspondence between the representatives of the respective parties, in which an offer was made on behalf of the plaintiff to accept the sum of £317 in settlement of his demand. His advisers seem to have been under the impression that the defendants had offered £100; but I am satisfied that in this they were mistaken. They were informed in the clearest

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

language in two letters that the agents of the Company had not and could not make an offer on behalf of their principals, and that therefore there was no reason why the arbitration previously suggested by the plaintiff should not proceed. A draft submission to arbitration was afterwards submitted by the solicitors for the plaintiff to the defendants, which may or may not have confined the matter referred to the question of amount; but this was not accepted by the agents of the defendants, who returned it with a statement that the conditions of the policy were in themselves sufficient submission to arbitration, and no other was therefore required beyond the appointment of arbitrators in writing. Accordingly the plaintiff appointed Mr. Kennedy, a cycle agent, as arbitrator; and the defendants nominated a solicitor named M'Cutcheon as the other arbitrator. These gentlemen made their award in due course, wherein, after reciting the circumstances that led to their appointment and that there was a difference as to the plaintiff's claim, and after further reciting that the reference came on for hearing before them in the presence of the claimant with his counsel and solicitor, and in presence of the solicitor and assessor of the Insurance Company, and after hearing the evidence and arguments adduced by and on behalf of the respective parties and on examination of the documents submitted to them, they find and award that the claim of James Gaw is fraudulent in a material respect, and that fraudulent devices have been used by him, or some person acting on his behalf, for the purpose of obtaining a benefit under the policy, and they accordingly find that James Gaw has forfeited all benefit under the policy, and is not entitled to recover any sum in respect of his claim.

This finding is based on a condition in the policy that if the claim of the insured be in any respect fraudulent, or any fraudulent devices are used by the insured, or any one acting on his behalf, to obtain a benefit under the policy, all benefit thereunder shall be forfeited. In these circumstances this action was brought for the purpose of having the award declared void. Some consequential relief is asked for in the statement of claim, but this was abandoned in the Divisional Court, and we are not now called on to consider the somewhat puzzling question of what would be the consequences

Appeal. 1908.

GAW v. BRITISH LAW FIRE INSNCE. CO.

Holmes, L.J.

of a judgment setting aside the award. The only evidence given before Mr. Justice Ross, or in this Court, were the policy of insurance, the award, and the correspondence that passed between the parties; and we have therefore no proof of what happened at the arbitration. The plaintiff's counsel account for this by saying that the object of the action is to raise the purely legal question that the arbitrators had no jurisdiction to find that the insured had forfeited all benefit under the policy for the reasons given by them. Mr. Justice Ross dealt with—and I think properly dealt with—the case from this point of view; but in thus approaching it, we are not at liberty to assume that there was any disregard of the principles of natural justice, or other impropriety, on the part of the arbitrators in coming to the conclusion embodied in their award. When the learned Judge says that it is contrary to natural justice to allow a man to go into an arbitration believing that the only question is one of amount, and then to spring upon him the charge of fraud without previous notice, he lays down a proposition in which I would agree, provided the man was not given full opportunity of meeting the charge and defending his conduct. But I have no reason to hold that this is what happened in the present case. I am satisfied from the correspondence that the matter referred was whether the defendant company was under any liability to the plaintiff, and if so to what amount. I have no means of knowing that the plaintiff entered on the arbitration in the belief that the only question was one of amount. We have neither his own testimony nor that of any witness on his behalf; and I cannot without evidence ascertain what a man believed at any particular date. Furthermore I cannot assume that he and his advisers were not invited, and given full opportunity, to explain the acts that the award finds to have been fraudulent devices. He may have tried to do so and have failed; or he may have declined, as his counsel have done, to give any evidence relating thereto on the ground that these were matters which the arbitrators had no jurisdiction to inquire into.

I have quoted and commented on the foregoing passage in the judgment of Ross, J., to prevent my own views from being misunderstood; but it is right to say that it formed no part of his "ratio decidendi," which he states with characteristic clearness.

He ruled in favour of the plaintiff, quite irrespective of whether the question of fraud was or was not a difference arising out of the policy, upon the ground that the plaintiff could not by any condition or stipulation be debarred from having his case heard by the ordinary Courts of the country. He held, as I understand his judgment, that the plaintiff had no cause of action until the arbitrators had ascertained the amount of his loss, but that their jurisdiction was confined to declaring such amount, and did not extend, where there was some loss, to awarding that the company was relieved from liability, either by reason of the fraud of the insured, or on any other ground. It would, I think, be difficult to exaggerate the importance of the proposition thus laid down. We are all familiar with the rule of law, that a term in a contract that any matter of difference arising thereon shall be referred to arbitration cannot be used as a defence to, or a ground for staying, an action brought by either party for the purpose of having the matter in difference adjudicated upon by one of the public Courts of the country. We also know that some modifications of, or exceptions to, this rule were laid down by the House of Lords in *Scott* v. *Avery* (1). It will not be denied that that decision legalizes a stipulation in a contract that any difference as to the amount of liability thereunder is to be referred to arbitration, and that no action can be maintained until the amount is so settled, and then only for such sum as shall be awarded. Speaking for myself, however, I have always been of opinion that *Scott* v. *Avery* (1) went farther than this, and is an authority that a contract may legally provide that where a difference arises thereunder relating to other matters than amount, no liability is to arise, and no action is to be maintained until the matter of difference has been made the subject of arbitration and award. This has been not only my opinion, but is, I think, the view generally taken by lawyers during the last forty years. As Martin, B., says in *Tredwen* v. *Holman* (2), "The case of *Scott* v. *Avery* (1) decided that the insurer and the underwriter may contract that no right of action (to be enforced in a Court of law) shall accrue until an arbitrator has decided, not merely as to the amount to be recovered

(1) 5 H. L. Cas. 811. (2) 1 H. & C. 72.

Appeal. 1908. GAW v. BRITISH LAW FIRE INSNCE. CO. Holmes, L.J.

but upon any dispute that may arise upon the policy"; and I may also quote Amphlett, B., one of the majority of the Exchequer Chamber, in the *Aberayron Case* (1)—"It must be taken to have been the intention of the parties to give exclusive jurisdiction to the directors to settle all claims between the society and its members, and the question whether an agreement to that effect is void as being against the policy of the law, is, in my judgment, concluded by the decision of the House of Lords in *Scott* v. *Avery* (2). It is true that in the present case the directors are to decide not the mere amount of the claims, but also any dispute that might arise respecting insurances, but so they were in *Scott* v. *Avery* (2), and both the learned Lords who decided the case held such extension of the powers of the directors to be immaterial."

I might refer to many similar dicta of distinguished Judges, but I prefer to see what is relied on in support of the contrary view, and I find that the only authority mentioned by Mr. Justice Ross is the judgment of Brett, J., in *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1). That case is curious and complicated. For my present purpose it is enough to say that the defendants were a limited Company for the mutual insurance of ships belonging to members; and the Articles of Association provided that the directors should have full power to determine all disputes arising between the Society and members concerning insurances or claims upon the Society, and the decision of the Directors should be final and conclusive, and no member should be allowed to bring any action or suit against the Society for any claim upon the Society except as provided therein. The plaintiff insured, with the Society, a vessel which was wrecked, and he sent in his claim for the loss; whereupon the Directors, having heard from the master of the ship his account of the wreck, resolved that it was not lost by perils of the sea, and that the owner had no claim upon the Society. This was done behind the back of the plaintiff, who had no notice or knowledge of the meeting; and he brought an action against the defendants to recover the amount of his insurance, which came before the Court of Queen's Bench on a case stated. Not only were the foregoing facts admitted,

(1) 1 Q. B. D. 563. (2) 5 H. L. Cas. 811.

but it was also admitted that the vessel had become a total loss by perils of the seas. There were other points argued, but the main contention turned on the Article of Association which I have quoted; and Blackburn, Mellor, and Lush, JJ., held, on the authority of *Scott* v. *Avery* (1), the action did not lie.

The case was then brought into the Exchequer Chambers, where Archibald, J., and Pollock, B., came to the same conclusion as the Queen's Bench. Amphlett, B., took the view of *Scott* v. *Avery* (1), which I have already quoted, and thought that the action could not be maintained unless it could be shown that the conduct of the Directors in the so-called arbitration had made it inequitable to bind the plaintiff by their finding, or to compel him to submit his claim again to their determination. This he held on an examination of the facts; and he therefore decided in favour of the plaintiff. But Lord Esher, then Brett, J., distinctly, and Kelly, C.B., with more doubt, took the narrow view of *Scott* v. *Avery* (1), on which Mr. Justice Ross has acted. It must, however, be remembered that in doing so they not only differed from the majority of the Exchequer Chamber, but from the three Judges of the King's Bench. The *Aberayron Case* (2) has, as far as I am aware, been only referred to in one subsequent English case, *Trainor* v. *The Fire Insurance Company* (3), in which Lord Esher's view of the effect of *Scott* v. *Avery* (1) was dissented from; and in *Scott* v. *The Mercantile Accident and Guarantee Insurance Company, Limited* (4), Lord Esher himself gave a judgment absolutely inconsistent with his dicta in the *Aberayron Case* (2). In *The Caledonian Insurance Company* v. *Gilmour* (5) Lord Watson regarded the principle of *Scott* v. *Avery* (1) to have been embodied in the emphatic words of Lord Campbell: "'I think that the contract between the shipowners and the underwriters is as clear as the English language could make it; that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action.

(1) 5 H. L. Cas. 811.
(2) 1 Q. B. D. 563.
(3) 65 L. T. (N. S.) 825.
(4) 66 L. T. (N. S.) 811.
(5) [1893] A. C. 85.

Appeal. 1908. GAW v. BRITISH LAW LIFE INSNCE. CO. Holmes, L.J.

There is no doubt that such was the intention of the parties; and, upon a deliberate view of the policy, I am of opinion that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers as well as the amount to be paid.' He then deals with the question whether such a contract is tainted with illegality, which he answers in the negative; and the main ground of judgment is expressed by him in these terms :— 'Now, in this contract it is stipulated in the most express terms that until the arbitrators have determined, no action shall lie in any Court whatever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined.' " I hold that every word of this passage is applicable to condition 6 of the policy in this case; that the effect of that condition is that an award of arbitrators is a condition precedent to any liability or right of action against the Company in respect of any claim for any loss or damage, or in respect of any other matter in difference, and that there is no illegality in such a stipulation.

This disposes of the ground on which judgment was given in the Divisional Court; but Mr. Brown relies on two other matters on which Mr. Justice Ross did not express any definite opinion. The first of these is that the question of fraud or fraudulent devises was not a matter in difference between the parties previous to the arbitration. It is true that there had been no reference to fraudulent devices in the correspondence; and probably they were not present to the mind of the advisers of either party. The matter in difference, however, was the liability of the defendant Company; and I am of opinion that they were at liberty to rely on any defence to the claim arising from the terms of the policy. Although no evidence was given at the trial of what were the alleged fraudulent devices, documents were produced without objection in the Divisional Court, and have also been seen by us, which show the nature of the fraud. The plaintiff obtained from a cycle company with which he dealt duplicates of twenty invoices of goods purchased by him shortly before the fire; and these

documents were laid before the arbitrator in proof of the value of the stock on the plaintiff's premises. All these duplicates are said to have been altered by the plaintiff or some one acting in his interest by adding additional goods to a considerable amount. If this was the case, the alterations were skilfully made and were evidently intended to deceive; and the moment the honesty of these invoices was challenged by the defendants' representatives, this became a matter in difference on which the arbitrators had jurisdiction to decide. Of course the plaintiff was entitled to rebut the charge if he could do so; but a letter from the arbitrators read by his counsel shows that they made their award with great reluctance, and I have no doubt they gave him ample opportunity to show that the allegation of fraud could not be supported.

I have some difficulty in following the other argument urged by Mr. Brown; but, as I understand him, it turns upon the final provision of the second condition, which is to the effect that in the event of the use of any fraudulent devices all benefit under the policy should be forfeited. Mr. Brown contends that this puts an end both to the policy and all differences arising thereunder. I do not think so. It is made a term of the contract that certain conduct on the part of the insured will deprive him of any benefit thereunder; and whether he has been guilty of such conduct or not is a matter of difference arising out of the policy. Therefore, I hold that the appeal ought to be allowed and the action dismissed.

Solicitor for the plaintiff: *James Alexander.*

Solicitors for the defendant Company: *William Findlater & Company.*

R. G. L. L.

Appeal.
1907.
Dec. 9.

MUNRO *v.* HENDERSON (1).

Will—Construction—Supplying words.

APPEAL by the plaintiff from the judgment of Barton, J., [1907] 1 I. R. 440.

M'Ilroy, K.C., and *M'Gonigal*, for the appellant.

Bates, K.C., and *Andrews*, for the executors of Mrs. Neely, and *S. L. Brown, K.C.*, and *C. Murphy*, for the appointees under her will, were not called on.

THE COURT affirmed the judgment of Barton, J., and dismissed the appeal, with costs.

Solicitor for the plaintiff: *D. M'Gonigal.*
Solicitors for the executors: *Johns, Bates, & Johns.*
Solicitor for the appointees: *T. B. Wallace.*

R. D. M.

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

BUNBURY *v.* THE HIBERNIAN BANK, Limited.

(1907. No. 368.)

Ross, J.
1907.
Dec. 10, 11.
1908.
Jan. 21.

Purchase for valuable consideration without notice—Constructive notice—Fraud—Principal and agent—Bill of exchange—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 30.

B., a widow of intemperate habits, under the influence and control of K., a widower, with whom she for some time lived, was, by fraud and undue pressure, induced by K. to deliver to K. certain scrip, to be lodged by K. with the defendant Bank as security for a loan by the Bank to K. The Bank manager, beyond being informed that B. was staying at K.'s house, knew nothing about the relations existing between B. and K., and made no inquiry, and never saw B., but employed K. to obtain B.'s signature to blank transfers of the scrip and to promissory notes, signed by her as collateral security for the loan. B. afterwards became of unsound mind.

In an action by B., by the committee of her estate, against the Bank, asking for a declaration that the deposit of the scrip created no equitable mortgage, that the blank transfers were invalid, and that the plaintiff's estate was not liable on foot of the promissory notes:—

Held, that the plaintiff was entitled to the declaration sought, on the grounds—(1) that the Bank were, by the circumstances of the transaction, put on inquiry, and not having made inquiry, were affected with notice of the invalidity of the transaction, and could not rely on the defence of purchase for value without notice; (2) that the Bank made K. their agent for the purposes of the transaction; and that K.'s knowledge must, therefore, be imputed to the Bank, who must stand or fall with K.

Trial of Action.

The action was transferred for hearing before Mr. Justice Ross. There were no pleadings. The writ of summons claimed an order for the recovery from the defendants of the original scrip for two sums of £169 4 per cent. debenture stock of the Alliance Gas Company, and £214 4 per cent. debenture stock of the Great Northern Railway Company, Ireland, both registered in the name of the plaintiff; and also that the defendants do deliver up to the Registrar in Lunacy, to be cancelled, the two blank transfers executed by the plaintiff of the said sums of stock; and for a

Ross, J. 1907. BUNBURY v. HIB. BANK.

declaration that the deposit of the said scrip did not create any valid equitable mortgages of the said stocks, and that the said blank transfers were invalid, and that the plaintiff or her estate was not liable on foot of the two bills or promissory notes signed by her in December, 1903, for £160, and in December, 1904, for £250 or the renewals thereof.

The facts are fully stated in the judgment of Ross, J.

Serjeant O'Connor, K.C. (with him *Matheson, K.C.*, and *J. B. Burke*), for the plaintiff :—

It is enough for the plaintiff to prove that the Bank were put on inquiry into the real circumstances, and that, if they had inquired, they would have found out the relations between the plaintiff and Kenny. It is enough if we prove that she was under the influence and control of Kenny, unduly exercised, and that, from whatever motive, she would do anything Kenny asked her to do, and that the Bank, if they had inquired, could have ascertained these facts. Though a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud : *Owen and Gutch* v. *Homan* (1). The Bank cannot shelter themselves behind the fact that they made no inquiry when they were put on inquiry : *Oliver* v. *Hinton* (2).

Henry, K.C. (with him *H. Wilson, K.C.*, and *W. G. Gibson*), for the Hibernian Bank :—

The plaintiff's incompetence has not been established. Assuming she was incompetent, she signed bills of exchange. Before they became due the Bank became *bona fide* holders for value of these bills, and are protected by law. There was no antecedent liability by Kenny to the Bank. The Bank paid the £160 money down across the counter ; and the manager on the same date made a report to the head office. If the manager acted honestly, the Bank is protected. Neither negligence nor stupidity is sufficient ; the plaintiff must prove *mala fides*, in other words, a criminal con-

(1) 4 H. L. Cas. 997, at p. 1035. (2) [1899] 2 Ch. 264.

spiracy between Kenny and the Bank: *London Joint Stock Bank* v. *Simmons* (1). Gross negligence is only evidence of *mala fides*, but is not *mala fides*: *Goodman* v. *Harvey* (2). The Bank are protected by sect. 30 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61): *Tatam* v. *Haslar* (3); *Jones* v. *Gordon* (4); *Raphael* v. *Bank of England* (5).

H. Wilson, K.C.:—

The equitable doctrine of constructive notice does not apply to mercantile transactions: *Manchester Trust* v. *Furness* (6). Assuming that there was an onus, under sect. 30 of the Bills of Exchange Act, on the Bank to give evidence that they gave value in good faith, the Bank have given such evidence.

Matheson, K.C., in reply:—

None of the cases cited was between original parties to a bill. They were all concerning holders who had taken them as indorsees by negotiability, and do not apply to the case of an original holder of a bill. This case is not a simple bill of exchange case, nor an ordinary banking transaction. Once the Bank manager had notice that Kenny was in a fiduciary capacity to the plaintiff, they were put on inquiry. The mere fact that the lady left her home, and went to live with Kenny, was enough to show the Bank that she was under Kenny's influence: *Aldritt* v. *Maconchy* (7).

1908.
Jan. 21.

Ross, J.:—

In this action the plaintiff is Mrs. Alice Bunbury, a person of unsound mind, suing by Digby Patrick French, the committee of her estate.

The defendants, the Hibernian Bank, have submitted to the jurisdiction of the Lord Chancellor in Lunacy.

There are no pleadings. The writ of summons claims an order for the recovery of the original scrip for two sums, of £169 4 per cent. debenture stock of the Alliance Gas Company, and

(1) [1892] A. C. 201.
(2) 4 A. & E. 870.
(3) 23 Q. B. D. 345.
(4) 2 App. Cas. 616.
(5) 17 C. B. 161.
(6) [1895] 2 Q. B. 539.
(7) [1906] 1 I. R. 416.

Ross, J.
1908.

BUNBURY
v.
HIB. BANK.

£214 Consolidated 4 per cent. debenture stock of the Great Northern Railway Company, Ireland. It also claims further consequential relief.

The history of the case is strange and sad. The plaintiff was the wife of Captain Bunbury, an officer who had served in the army. He died in the year 1898, leaving the plaintiff, his widow, and two children, a boy of ten and a girl of eight, surviving. The family continued to live at Captain Bunbury's residence, Woodville, which is about five miles from Nenagh. Under her marriage settlement Mrs. Bunbury had a life interest in this property, and she was entitled to the shares mentioned in the writ, absolutely, under her father's will. Further, she and her sisters were each entitled to a third share of a small property called Clonanan at Borris-in-Ossory. In all, her income amounted to a little over £100 a year. At the time of her husband's death this lady was about thirty-three or thirty-four years of age. She was the daughter of a most respectable Dublin solicitor. On the evidence before me, and judging from the appearance and manners of her family, I think she must have been a lady of taste and refinement. She lived a solitary life. Her sisters and brothers were married and living elsewhere. She had no regular servants. She employed a servant who did not live in the house and a boy who worked about the place and attended to her horse and trap.

Some time after her husband's death she contracted drinking habits. About ten miles away, at a place called Aglish Glebe, there lived a Mr. Kenny. He appears to be a kind of horse-dealer and farmer. She made his acquaintance about 1902. This man began to visit her very frequently in 1902 or 1903, usually about twice in the week. When he came, he used to remain in her house for the rest of the day, sometimes from 2 o'clock till 7 in the evening, and later; on one occasion he remained all night. They were in the habit of drinking together. It is hard to imagine what could have induced this lady to consort with Mr. Kenny, and I have no doubt that, in the words of her sister, Mrs. French, he came there for no good purpose. It is plain that he began to exercise an evil influence over her. He seems to have been quite reckless about her reputation. Mr. Kenny was a widower. He had one or two sons of whom we hear very little.

His home appears to have been dilapidated and ill kept. He had no housekeeper. There was one servant, a woman named Burke. A girl called Costello came from the village by day to assist her.

In the early part of the year 1903 Mrs. Bunbury visited this house several times. She sometimes stayed for two or three days. Finally, in the month of August, 1903, she became so bereft of all sense of propriety that she left her home and went to reside with Kenny at this establishment for two months or more. From that period up to the month af June, 1905, when she was taken from this house by her brother-in-law, she spent the most of her time there, occasionally visiting her own home. It appears that Kenny on one occasion took her away with him for a month to Spiddal in Galway. Afterwards, with the intention of letting Woodville, she had her plate and glass removed from her home and stored in Aglish. During this period she continued drinking at Kenny's house, with his knowledge, and often in his company. It would appear that during the intervals of sobriety she displayed considerable intelligence and capability. Alcoholic paralysis comes on by degrees; she gradually got worse, and in the early part of 1905 she became a hopeless wreck. Doctor French went to Aglish Glebe in June, 1905, and brought her away. Shortly afterwards she was examined by Sir Thornley Stoker and Dr. Joseph O'Carroll. They found her in a shocking condition: "Completely neglected—covered with bedsores—limbs contracted—knees drawn up to her chin—unable to move—in great suffering—the mind gone—silly and fatuous." In this condition she was found in Kenny's house. The facts speak for themselves. No matter how they are considered, the conduct of this man to this lady was barbarous and inhuman.

I must now proceed to consider in what way the Hibernian Bank became connected with these proceedings. The manager in the Portumna Branch was Mr. W. F. Fetherstonhaugh. The Bank opened a current account with Kenny in July, 1902. On 29th December, 1903, Kenny came in and asked would the Bank discount a bill if Mrs. Bunbury were surety, and lodged scrip as a security. He produced the scrip of the Gas Company, and lodged it then and there. He told the manager it belonged to Mrs. Bunbury. The manager then handed him a filled up

Ross, J. 1908. BUNBURY v. HIB. BANK.

promissory note which he was to send back with Mrs. Bunbury's signature upon it. The manager took the scrip and advanced Kenny £110 on the spot.

The manager knew very little about Kenny, and still less about Mrs. Bunbury. In fact, he knew nothing whatever about her except what Kenny told him. He appears to have been impressed with the statement that she was Mrs. Bunbury of Woodville, though he knew nothing about Woodville. He was, however, familiar with her signature, because Kenny had been in the habit of cashing her dividend warrants at the Bank.

On the 31st of December the manager received the promissory note, signed by Kenny and Mrs. Bunbury, and on that day the balance of £160 was advanced. The manager swears that he did not rely on the note, but on the scrip. I gather from his evidence that he considered her signature of the note as an authority to Kenny to lodge the scrip. The bill fell due on 2nd July, 1904, and was renewed on 5th July, and not passed through Kenny's account. Kenny himself brought in the renewal. After the bill became due, a form of transfer was sent down by the head office. It was handed to Kenny, that he might get Mrs. Bunbury to sign it. Kenny brought back the transfer executed by Mrs. Bunbury, and the witness to the signature was his own son.

We now come to the transaction of 10th December, 1904. The advance was this time £250. The procedure was practically the same, except that by direction of the head office the transfer deed was sent by post to Mrs. Bunbury, and it was directed to her at Aglish, Kenny's house, as Kenny informed the manager she was staying there. Kenny brought back the transfer signed, and witnessed as before by his son. The manager states that he never made any inquiry about Kenny's solvency or Mrs. Bunbury's solvency because he was secured by the scrip. He repeated several times that he relied entirely on the scrip. Kenny represented himself to the manager as a kind of agent for Mrs. Bunbury. Neither of these notes has been paid, and the Bank made Kenny a bankrupt in 1906.

[The judgment next dealt in detail with certain documents and memoranda in plaintiff's handwriting.]

These documents lead me to believe that Kenny was urging and pressing Mrs. Bunbury to allow him to raise money on her scrip, and that at the time she was confused by drink, but, notwithstanding, had some notion of the nature of the transaction. But she had no independent advice, and I think it was never properly brought before her mind that she was in grave danger of losing all the property she had that was capable of ready realization. The correspondence shows that the poor lady was deeply attached to her children. One of them was a young girl in need of education and support. The other was a young man, not very strong in health, sent out to undertake the arduous life of a Canadian farmer.

That Kenny had failed in his agreement with her must have been evident when he required her to sign the renewals of the first note. She must have known from Kenny's surroundings that there was little chance of that note ever being paid. Notwithstanding this knowledge, Kenny again induces her to part with her only remaining, and still more valuable, scrip. She signed apparently everything Kenny asked her to sign, and the witness to the transfer was his own son.

[The judgment next dealt with the oral evidence given at the trial.]

Was Mrs. Bunbury a free woman under such circumstances? Kenny has not been called by either side, and I have not heard his account of the matter. But on the evidence I can arrive at no other conclusion than that he kept this lady like a captive, and defrauded her without pity or scruple.

I now come to the Bank manager, Mr. Fetherstonhaugh. He seems to be a man of intelligence and of good business capacity. I accept his statement that he knew nothing about the relations of Kenny and Mrs. Bunbury. But it ought to have struck even the most unsuspicious mind that it was a very odd thing for a man like Kenny to walk into the Bank and propose to deposit a lady's scrip in return for a cash advance to himself. His mind was very easily satisfied when he was content with the signed note and the signed transfer. The lady might have been an old lady in her dotage, or a girl who had just attained twenty-one. Again, the fact that Kenny was unable to pay the first

Ross, J.
1908.
BUNBURY
v.
HIB. BANK.

note should have impressed him. But on the 10th of December, 1904, he receives again from the same man the other scrip, and on the security of this scrip, having obtained another note and another transfer, he advances to this man £250. Even on the facts as they were known to him, there was enough to put him upon careful inquiry.

The Bank's contention is that I am to treat this case as if they were suing on the promissory notes; that they are holders for value; that at most they were guilty of negligence, and not guilty of fraud; and they insist that the doctrine of constructive notice is not to be applied in the case of bills of exchange.

With this principal contention I cannot agree. The transaction must be looked at, not simply as a bill transaction, but in the light of all the circumstances. How did the Bank regard it themselves?

The manager relied altogether on the property, the scrip. The note he only regarded as an authority to Kenny to lodge the scrip. He tells us that he thought Kenny was the lady's agent. Now assuming that to be so, it was incumbent on him to make inquiry. I have nothing to say on this subject that I have not already said in *Aldritt* v. *Maconchy* (1). I take a short statement of the law from Kerr on Fraud. "If a man abstain from inquiry, when inquiry ought to have been made, it is immaterial that the neglect to make inquiry may not have proceeded from any wish to avoid knowledge; it may be that inquiry might not have brought out the truth. But a man who abstains from inquiry, when inquiry ought to have been made, cannot be heard to say so and rely on his ignorance."

There is one other way in which the matter may be regarded. The success of a Bank, or of any other business, involves the taking of a certain amount of risk. A manager who is overtimid, and who trusts nobody, will probably in these days of keen competition fail to make his branch a success. He uses his knowledge of the world and of men in deciding when and in whose favour it is worth while taking risks. He may sometimes, for instance, cash a small cheque for a stranger who represents himself as a customer of the Bank on which the cheque is

(1) [1906] 1 I. R. 416, at p. 431.

drawn. The manager may be defrauded, though he has acted in perfect good faith. He takes the risk. It turns out unfortunately. He loses the money, and he cannot complain. It is to the advantage of Banks to be obliging to possible customers, or else they would not subject themselves to such risks.

Now in this case the manager trusted Kenny. He employed him, so to speak, to get the transfer-deed and the note, and he took the scrip from his hand. Having the scrip, he relied entirely on Kenny's representations, and advanced the money to Kenny alone.

It therefore comes to this, that the Bank made Kenny their agent for the purposes of the transaction. The Bank must accordingly stand or fall with Kenny. They left everything to him, and cannot avoid the consequences. The knowledge that Kenny in fact possessed, and that the Bank did not possess, must be imputed to the Bank. After the close of the argument in this action I was referred to a case of *Chaplin* v. *Brammall*, reported in the *Law Times* of 7th December, 1907, p. 129 (1). I directed my Registrar to write to the Registrar of the Court of Appeal in England. Mr. Coleridge, Assistant Master of the Crown Office, has most kindly sent a very clear note of the case.

It was an action on a guarantee against a married woman. The defendant's husband was starting business as a wine and spirit merchant, and he applied to the plaintiff company, who were wholesale wine and spirit merchants, to supply stock on credit. He informed them that his wife had property of her own, and that she would give a guarantee for the price of the goods. On the same day, the plaintiffs wrote to the husband enclosing a form of guarantee for obtaining the signature of the defendant, and her husband obtained her signature.

Mr. Justice Ridley found as a fact that she was not sufficiently informed by her husband of the real nature of the instrument, and gave judgment for the defendant. From this an appeal was taken, and the Court of Appeal held that, as the plaintiffs had left the whole matter to the husband, and as the wife did not know what she was signing, the plaintiffs could not recover.

(1) Since reported—[1908] 1 K. B. 233.

Ross, J.
1908.
BUNBURY
v.
HIB. BANK.

This strongly supports the conclusion at which I had arrived, namely, that the Bank left everything to Kenny, and must take the consequences. I accordingly declare that the deposit of the scrip created no equitable mortgage, that the blank transfers are invalid, and that the plaintiff's estate is not liable on foot of the promissory notes. The defendants must pay the costs of the action.

Solicitors for the plaintiff: *Joseph Burke & Son.*
Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*

D. M. S.

Wylie, J.
1908.
March 12.

IN THE MATTER OF THE ESTATE OF M. J. MALONE.

Land Purchase Acts—Limitations on advances—Zone cases—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 1, *sub-s.* 4—*Purchase of Land Amendment Act* (51 & 52 *Vict. c.* 49), *s.* 2.

In cases coming within the provisions of sect. 1, sub-sect. 1, of the Irish Land Act, 1903, the Estates Commissioners, while bound to make advances applied for by a purchasing tenant up to £3000, including in that £3000 any sums already advanced to the same tenant for his own benefit, and not as a trustee, are not bound to make advances applied for in excess of that amount, unless they consider it expedient to make larger advances within the prescribed limits for the purposes mentioned in section 2 of the Purchase of Land Amendment Act, 1888, or section 1, sub-section 4, of the Irish Land Act, 1903.

QUESTIONS OF LAW submitted by the Estates Commissioners for the opinion of the Judicial Commissioner, pursuant to sect. 23 (1) of the Irish Land Act, 1903. From the memorandum of the Estates Commissioners the following facts appeared:—

On 16th November, 1903, the owners lodged an originating request, instituting proceedings for the sale of 22A. 1R. 26P. of the lands of Corbally, County Limerick, to the Estates Commissioners, under sect. 6 of the Irish Land Act, 1903. The lands were held by Robert M'Namara as a yearly tenant. A fair rent had been fixed by a Sub-Commission, but the owners had appealed against the decision on the ground that the holding was one to

which the Land Law Acts did not apply, and the said appeal was then pending. The Commissioners in the exercise of their discretion refused to declare the lands an estate. On the 19th December, 1905, the Land Commission confirmed the order of the Sub-Commission, fixing a fair rent on the holding. The owners then proceeded to sell the lands direct to the tenant pursuant to sect. 1 of the Irish Land Act, 1903. The originating request was modified into an originating application, and a purchase agreement, signed by the owners and the tenant, was lodged on the 2nd January, 1906, for the purchase of the holding for the sum of £1325, and an application made for an advance of the said sum. The Commissioners, having regard to the decision of the Land Commission on appeal fixing a fair rent on the holding, and in accordance with their then practice, provisionally declared the lands fit to be regarded as an estate.

The said holding comprised the whole estate of the vendors.

The advance of £1325 applied for by the tenant was within the provisions of sect. 1 (1) of the Act, 1903, but the tenant had already obtained two advances under the Land Purchase Acts, one for £1444, and the other for £1250, making a total sum already advanced of £2694.

The Commissioners were prepared to advance a sum of £306 to the said tenant, to assist him in carrying out the proposed sale, such sum of £306 making, with the said sum of £2694 already advanced to this purchaser, the sum of £3000.

The Commissioners were not of opinion that it was expedient to make an advance to the said tenant in excess of the said sum of £306 for the purposes of carrying out the sale of this holding.

At the request of the tenant the Commissioners referred the following questions of law:—

(1) Whether the Estates Commissioners had power, notwithstanding the limitations as to advances contained in the Purchase of Land (Ireland) Amendment Act, 1888, to sanction the advance applied for by the said Robert M'Namara, for the purchase of his holding? and

(2) Whether, having regard to the fact that the purchase annuity payable in respect of the price agreed on for the purchase of the holding was within the limits prescribed by sect. 1 (1) *a* of

Wylie, J. 1908. *In re* MALONE'S ESTATE.

the Irish Land Act, 1903, and that the advance now applied for, together with the advances already made to the tenant, would not exceed £7000, the Commissioners were bound to sanction the advance applied for?

Ronan, K.C., for Robert M'Namara :—

The question turns on sect. 2 of the Purchase of Land (Ireland) Amendment Act, 1888, and sect. 1 of the Irish Land Act, 1903. A narrow construction ought not to be put on the former section when there is no doubt as to the adequacy of the security. See note to sect. 1 (4) of the Act of 1903, in Sullivan's Irish Land Acts, and *Shaw* v. *Townshend* (1) therein referred to. The Estates Commissioners would be bound to make advances to the purchasing tenant up to £3000. The judicial discretion conferred upon them as to making advances in excess of that sum must be exercised when the conditions necessary for its exercise exist. The only possible ground on which they could refuse to exceed that sum would be want of security. But the statute has declared that in zone cases the security must be regarded as sufficient. The Estates Commissioners are, therefore, bound to make the advance applied for in this case.

Serjeant O'Connor, K.C., and *Dudley White*, for the Treasury :

The sections in question are made expressly subject to limitations. The applicant for an advance in excess of those limitations must show that he has got rid of them. The only way he can do so is by showing that the Land Commission are of opinion that it is expedient to exceed the limitations. But here there is an express declaration by the Estates Commissioners that they are not of this opinion. Therefore, the purchasing tenant has no right to an advance in excess of £3000.

W. Q. Murphy (with him *Herbert Wilson, K.C.*) appeared for the landlord.

(1) 34 Ir. L. T. R. 191.

WYLIE, J.:—

It seems to me that the law is clear. Prior to the Act of 1903 no one could question the decision arrived at by the Land Commission as to the amount of an advance to be made in any particular case. The first time it is made compulsory on the Land Commission to make the advance applied for in a particular case is in the case of a holding coming within the provisions of section 1 (1) of the Irish Land Act, 1903. That section obliges the Land Commission, when an application is made for an advance of the whole purchase-money of a holding, to sanction the advance applied for in any case therein mentioned, if they are satisfied that the tenant is in occupation of the holding, subject, however, to the limitations in the Land Purchase Acts on advances to tenants purchasing their holdings. The limitations cannot be exceeded unless the Land Commission think it expedient to advance a larger sum within certain higher limits mentioned. Accordingly, the only amount the Land Commission would be bound to advance to any one purchaser, in cases coming within section 1, would be £3000, including in that £3000 any sums already advanced to the same purchaser for his own benefit and not as trustee (Act of 1896, s. 30). The only ground on which the purchaser would be entitled to a larger sum would be on the ground that the Land Commission thought it expedient to advance a larger sum, for the purpose mentioned in section 2 of the Act of 1888, or section 1 (4) of the Act of 1903. Accordingly, where the Estates Commissioners have expressed the opinion that it would be inexpedient to advance a larger sum than £3000—which, I take it, is the meaning of the case stated—to the purchasing tenant, they are not bound to advance a larger sum. I answer question 2 in the negative. As to question 1, my answer is in the affirmative, with this qualification, "provided the Estates Commissioners consider it expedient to make the larger advance applied for for the purposes mentioned in section 2 of the Act of 1888, or section 1 (4) of the Act of 1903."

Solicitor for Robert M'Namara: *F. M. Fitt.*
Solicitor for the Treasury: *W. G. Towers.*
Solicitors for the landlord: *J. Kearney & Son.*

J. E. W.

M. R.
1907.
Nov. 8, 9, 12.

In re TURNER, Deceased.

ARMSTRONG *v.* GAMBLE.

(1906. No. 81.)

Will—Legacies—Specific and demonstrative—Abatement of.

In the event of assets not specifically bequeathed being insufficient to pay debts, specific and demonstrative legacies abate rateably.

A testator made specific devises and bequests, and gave pecuniary legacies, and directed that they should be paid out of specific railway stock held by him. His assets not specifically bequeathed were insufficient to pay his debts :—

Held, that the assets specifically devised and bequeathed, and the specific stock devoted to payment of the pecuniary legacies, were equally liable to contribute to payment of debts, and that the respective devisees and legatees should abate rateably.

Further consideration.

This was a proceeding by way of originating summons brought by Henry Bruce Armstrong and William Moore Morgan, the executors of Robert Turner, to administer his personal estate. The defendant, Leonard Dobbin Gamble, was the residuary legatee under the will of the testator, which was proved by the plaintiffs on May 24th, 1905. A decree for the administration of the personal estate of the deceased was made by the Master of the Rolls on February 19th, 1906, and a supplemental decree for administration of his real estate was made on July 16th, 1906.

The testator was possessed of considerable real and personal estate. By his will, dated September 24th, 1904, he specifically devised and bequeathed certain portions of his real and personal estate, and gave several pecuniary legacies, and directed that they should be paid out of his share of £1200 Stock in the Great Northern Railway Company of Ireland held in the joint names of himself and William Macartney and out of his other shares in the said company standing in his own name. The testator left, devised, and bequeathed the residue of his property of every kind, not

thereinbefore specifically devised or bequeathed, to the defendant, Leonard Dobbin Gamble, subject to and charged with payment of his debts, and funeral and testamentary expenses.

The assets of the testator not specifically bequeathed or devised were not sufficient to pay his debts, funeral, and testamentary expenses, and the question (amongst others) arose on further consideration of the Chief Clerk's certificate, whether, by reason of the direction contained in the will to pay all the pecuniary legacies out of the Stock of the Great Northern Railway Company, the said legacies were demonstrative legacies, and whether the said pecuniary legacies would be primarily liable to abate rateably in order to satisfy the deficiency of assets, or whether the specific devises and bequests would also be liable to contribute rateably to satisfy such deficiency. The personal estate of the testator outstanding consisted *inter alia* of £600 ordinary Stock of the Great Northern Railway of Ireland, being one-half of the £1200 like Stock referred to in the will as standing in the names of the testator and of William Macartney, and of £2250 ordinary Stock of the said Company standing in the name of the testator. The pecuniary legacies directed to be paid out of the said Stocks amounted to £3575.

Matheson, K.C., and *Charles Murphy*, for the plaintiffs.

Best, for the pecuniary legatees :—

The legacies here are clearly demonstrative; they are gifts of money payable out of specific stock; the question is whether these demonstrative legacies and the specific legacies proper are to abate rateably, the residue being insufficient to pay the debts and costs. There is no reported decision on the point, but there are several dicta in favour of the view that specific and demonstrative legacies abate rateably. In *Tempest* v. *Tempest* (1) Lord Cranworth says that a demonstrative legacy is in the nature of a specific legacy, as of so much money, with reference to a particular fund for payment; it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or

(1) 7 D. M. & G. 473.

M. R. 1907.

In re TURNER.

fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets, yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets. Here there are no general legacies. Again, in *Mullins* v. *Smith* (1), Kindersley, V.-C., points out the differences between specific and demonstrative legacies; he says:—"A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable." That implies that so long as the fund is there it is on the same footing as a specific legacy proper. In *Sellon* v. *Watts* (2), before the same Judge, the demonstrative fund was insufficient to pay the legacies directed to be paid out of it in full, and he held that they were to be paid rateably out of the fund as far as it would extend, and that the balance of such legacies was to be paid rateably with the general (pecuniary) legacies directed to be paid out of the testator's general estate. The form of the decree in that case is given in Seton on Decrees, 6th edition, vol. ii., p. 1617.

In *Smallbone* v. *Brace* (3) a testatrix bequeathed £400 to the plaintiff to be paid out of the sum of £500 in the hands of the defendant, Crompton. The defendant, Brace, the executor, declined to pay unless the plaintiff consented to an abatement, as the testatrix had given away above £2000 in legacies, and her estate amounted to only £1900. Lord Keeper Finch decreed the defendant, Crompton, to pay the £400 to the plaintiff, because it was in the nature of a specific legacy given to him, and ought not to be subject to any abatement whatever, though the estate should fall short to answer the other legacies. In *Robinson* v. *Geldard* (4) Lord Truro quotes with approval the explanation by Mr. Justice Williams, in his work on Executors, of the nature and incidence of demonstrative legacies, where he says, at p. 923 (5)—"A legacy of quantity is ordinarily a general legacy, but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for

(1) 1 Dr. & Sm. 204, at p. 210.
(2) 9 W. R. 847.
(3) Rep. *temp.* Finch, 303.
(4) 3 Mac. & G. 735, at p. 744.
(5) Williams on Executors (9th ed.), p. 1021.

payment; this kind of legacy is called by the civilians a demonstrative legacy, and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of the legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets."

S. L. Brown, K.C., for the specific legatees:—

The *dicta* are against me, but the cases cited only decided that a demonstrative legacy does not abate with general legacies. The question raised here did not arise. It is submitted that on principle these legacies, which are independent gifts of money, though followed by a direction to pay them out of a specific fund, should abate *inter se* before the specific legatees, who have no other fund to look to, are called on to abate.

Marnan, for the defendant.

Nov. 12.

THE MASTER OF THE ROLLS:—

In my judgment the argument of Mr. Best is correct. Apparently the point arising in the present case has not formed the subject of any reported decision. But it appears clear that so far as a demonstrative legacy is payable out of a specific fund, it is in its nature and essence quite as specific as, for example, a gift of the testator's shares in a particular bank would be. The conclusions of learned commentators, and the *dicta* of eminent Judges, are in favour of the view I take. Mr. Brown confesses himself unable to find any authority to the contrary effect.

Lord Cranworth, in *Tempest* v. *Tempest* (1), explains the general principles which should be applied in a case of this description. He says, at p. 473:—"A demonstrative legacy is in the nature of a specific legacy, as of so much money, with reference to a particular fund for payment; it is so far general, and differs so much in effect from one properly specific, that, if the fund be called in or fail, the legatee will not be deprived

(1) 7 D. M. & G. 470.

M. R. 1907.

In re TURNER.

of his legacy, but be permitted to receive it out of the general assets, yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets." The observations of Kindersley, V.-C., in *Mullins* v. *Smith* (1), proceed on the same basis. The other cases cited by Mr. Best are to the same effect.

Turning to a text book of great authority, viz., Williams on Executors, 10th edition, pages 912, 913, and 1100, it appears certain that the learned authors entertained no doubt that, in a case like the present, no distinction could be drawn between legatees entitled to specific legacies proper, and legatees entitled to legacies in the nature of specific legacies—"So a legatee entitled to a legacy of the sort just mentioned, in the nature of a specific legacy, must abate with the specific legatees." As a matter of principle, I decide that the view thus expressed is correct, and that in the circumstances of the present case the specific legacies proper, and the demonstrative legacies, so far as the particular fund set apart by the testator for their payment is available, must abate rateably.

Solicitors: *H. J. Harris*; *Best & Best*; *T. D. Kilpatrick*; *R. A. Andrews*.

W. L.

(1) 1 Dr. & Sm. 204, at p. 210.

FITZGERALD *v.* PERSSE, LIMITED.

Barton, J.
1908.
Jan. 23.
Feb. 10.

Company—Re-issued debentures—Priority—Redemption—Section 15 of the Companies Act, 1907 (7 Edw. 7, c. 50).

Sect. 15 of the Companies Act, 1907 (1), enables a Company (save as therein excepted) to keep its own debentures alive, for the purpose of re-issue from time to time, as security for advances from the Company's bankers, without disturbing their priority, and displaces the law as laid down upon that subject in *In re Geo. Routledge & Sons, Ltd.* ([1904] 2 Ch. 475), *In re Tasker & Sons, Ltd.* ([1905] 1 Ch. 283), and *In re Russian Petroleum and Liquid Fuel Co., Ltd.* ([1907] 2 Ch. 540). The section is retrospective, and operates upon past as well as future transactions, and it preserves the priority of such debentures as of the original date of issue, and not merely as of the date of re-issue.

A Company, before the passing of the Companies Act, 1907, deposited from time to time some of its first debentures with its bankers, as security for an overdraft. The practice was to transfer the debentures from nominees of the Company to trustees for the Bank, and, upon repayment of the overdraft, to re-transfer the debentures to nominees of the Company:—

Held, that the retrospective provisions of section 15 of the Companies Act, 1907, had the effect of preserving the original priority of these debentures.

A Company, in 1901, invited subscriptions for an issue of second debentures by a prospectus which contained a statement that the issue was made for the

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(1) Section 15: "(1) Where, either before or after the passing of this Act, a Company has redeemed any debentures previously issued, the Company, unless the articles of association of the Company or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the Company so to do, and not being an obligation enforceable only by the person to whom the redeemed debentures were issued, or his assigns, shall have power and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a Company has purported to exercise such a power, the Company shall have power, and shall be deemed always to have had power, to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same right and priorities as if the debentures had not previously been issued.

"(2) Where, with the object of keeping debentures alive for the purpose of re-issue, they have, either before or after the passing of this Act, been

Barton, J. 1908.

FITZGERALD v. PERSSE.

purpose, *inter alia*, of repaying a temporary loan from the Company's bankers. It was expressly stated in the prospectus, in the conditions on the second debentures, and in the trust deed, that the second debentures were to be puisne and subject to the whole of the first debenture issue. The loan from the Bank was repaid out of the proceeds of the second debenture issue; and some first debentures, which had been deposited with the Bank, and transferred to trustees for the Bank as security for the loan, were afterwards re-transferred from trustees for the Bank to nominees of the Company:—

Held, that these first debentures were not redeemed "in pursuance of any obligation so to do" within the meaning of one of the exceptions contained in section 15 of the Companies Act, 1907, and that the priority of these first debentures, as such, was not disturbed.

Section 15 of the Companies Act, 1907, considered and discussed.

MEMORANDUM from Chambers submitting certain questions for the opinion of the Court in the course of a debenture holder's action. The principal question for decision was whether all or any of 143 re-issued first debentures of this Company were a good, valid, and subsisting charge upon the property and undertaking of the Company, ranking *pari passu* with the other first debentures, and in priority to the Company's second or B debentures. The question turned mainly upon the provisions contained in sect. 15 of the Companies Act of 1907, 7 Edw. 7, c. 50.

It appeared from the affidavits that in 1896 Mr. H. S. Persse sold his distillery to H. S. Persse, Limited, in consideration of the whole share capital of the Company and of £100,000 cash to be raised by the issue of 1000 debentures of £100 each which were to rank *pari passu* as a first charge upon the property thereby charged. The trust deed con-

transferred to a nominee of the Company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

"(3) Where a Company has, either before or after the passing of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the Company having ceased to be in debit, whilst the debentures remained so deposited.

"(4) The re-issue of a debenture, or the issue of another debenture in its place, under this section, whether made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purpose of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued."

tained the usual provision (clause 4) to the effect that the company should not be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with these debentures. 150 of these first debentures were issued to Mr. H. S. Persse himself, who retained 137 of them and declared himself a trustee of them for the company. These 137 debentures were always afterwards treated by H. S. Persse, and after his death by his executors, as well as by the Company, as the property of the latter, and were used by the Company from time to time as a security for overdrafts or loans from the Bank of Ireland. In September, 1898, the Company deposited these 137 debentures with the Bank as a security for an overdraft, and a transfer of them was executed to trustees for the Bank, who, upon repayment of the debt in October, 1890, re-transferred the debentures to nominees of the Company. In the same month, October, 1890, the debentures were again transferred to trustees for the Bank as security for a further loan, and were, upon re-payment of the loan in or about September, 1901, re-transferred to nominees of the Company. They were, in September and November, 1901, transferred for a third time to trustees for the Bank as security for a fresh loan. Subsequently six other debentures were purchased by or in trust for the Company, and were transferred to trustees for the Bank as further security. These 143 debentures continued to be the Bank's security for the Company's overdraft down to the time of the winding-up of the Company and the institution of this action.

Early in 1901, while the 137 first debentures were held by the Bank as security for the Company's overdraft, the Company had duly authorized the issue of 5000 second debentures of £100 each, secured by a trust deed. In the prospectus it was stated that a temporary loan had been obtained from the Company's bankers, and that the issue was made for the purpose *inter alia* of repaying the loan. There was no reference to any such purpose in the debentures or in the trust deed. The trust deed contained the usual clause against creating any mortgage or charge ranking in priority or *pari passu* with the issue. The loan was repaid out of the issue, and the 137 first debentures were, as stated above, re-transferred in or about September, 1901, to nominees of the Company. There was no statement in the prospectus that any first

Barton, J. 1908. FITZGERALD v. PERSSE.

debentures were deposited as security for the loan, or that there was any intention of redeeming any first debentures: and it was expressly stated in the prospectus, in the second debentures themselves, and in the second debenture trust deed, that the issue of the B debentures was to be *puisne* and subject to the whole of the £100,000 first debenture issue. It was not alleged that, as a matter of fact, any second debenture holders were misled, or that they were aware that any first debentures were security for the loan, or that they supposed that it was a purpose of the issue to redeem any first debentures.

W. G. Gibson (with whom was *Serjeant O'Connor, K.C.*), for the liquidator and receiver, Sir Robert Gardner, stated the facts and the question for the decision of the Court.

Herbert Wilson, K.C., and *Pierce Nolan*, for the plaintiff :—

The re-isued debentures take priority only from the date of their re-issue. It was decided in *In re Tasker & Sons* (1) that a company could not re-issue debentures that had been paid off; and the effect of this section is to keep such redeemed debentures alive. That is the object of the section, but it does not provide that they are to take priority with the existing debentures, nor does it treat them as if they were part of a series of un-issued debentures. The redeemed debentures are kept alive, but their rights and priorities are as of the date of re-issue, as if they had never been previously issued.

The Right Hon. J. H. Campbell, K.C., and *Fetherstonhaugh, K.C.*, for the second debenture holders :—

The debentures which were re-issued, had previously been extinguished for the benefit of the second debenture holders. Under the prospectus of the second debentures, there was an obligation on the Company to redeem the first debentures, then lodged as security with the Bank; and that being so, the transaction is excepted by the words of the section itself from the operation of the section.

(1) [1905] 1 Ch. 283.

Molony, K.C., and *Collins*, for the defendants, the trustees for the debenture holders.

Ronan, K.C., *Gordon, K.C.*, and *Pim*, for the Bank of Ireland:—

The object of section 15 is to make the law what it was supposed to be before the decisions in *In re George Routledge & Sons* (1), *In re W. Tasker & Sons* (2), *In re Perth Electric Tramways* (3), and *In re Russian Petroleum and Liquid Fuel Company, Limited* (4). The question is not when these debentures were issued or re-issued, but to what issue they belong. They belong to the A issue, and under section 15 they must be deemed always to have had the same rights and priorities as if the debentures had not previously been issued—that is, the rights and priorities of un-issued debentures of the A issue. The second debenture holders were not misled by the prospectus, as the issue was clearly made puisne to all the first debentures.

BARTON, J.:— Feb. 10.

If it had not been for section 15 of the Companies Act, 1907, these 143 debentures would have lost their priority. The case would have been governed by several recent authorities upon the subject of re-issued debentures: *In re George Routledge & Sons* (1); *In re Tasker & Sons* (2); *In re Russian Petroleum and Liquid Fuel Company, Limited* (4). Under these decisions the re-payment of a loan secured by the deposit of debentures had the effect of extinguishing both the debt and the security. The Courts applied to the re-issue of its own debentures by a Company the principle recognized in *Otter* v. *Lord Vaux* (5), that a mortgagor who pays off an incumbrance created by himself cannot set it up against a subsequent incumbrancer. This principle was very familiar to lawyers; but its application to debenture transactions seems to have come as a surprise to the business community engaged in such matters, with the result that the Legislature intervened in the session of 1907, and passed into law a very remark-

(1) [1904] 2 Ch. 475.
(2) [1905] 1 Ch. 283.
(3) [1906] 2 Ch. 216.
(4) [1907] 2 Ch. 540.
(5) 2 Kay & J. 650; 6 De G. M. & G. 638.

Barton, J. 1908. FITZGERALD v. PERSSE.

able section—section 15 of the Companies Act of 1907. The section is drastically retrospective. Not satisfied with displacing the law as laid down in the cases just cited, the section retrojects its provisions into all past dealings and transactions. The explanation may be, as Mr. Gordon suggested in the course of his argument, that the Legislature came to the conclusion that the rule in *Otter* v. *Lord Vaux* (1) was not so well adapted to debenture transactions as to ordinary incumbrances such as mortgages on land, and had not, as a general rule, been in the contemplation of the Companies and the bankers and other lenders of money, who had been, as in the present case, in the habit of dealing with Companies' debentures as a convenient form of security for advances to Companies.

The section has, in my opinion, a direct application to the facts of the present case. This is a Company which before the passing of the Act had redeemed debentures previously issued. That being so, sub-section 1 applies, and the Company "is to be deemed always to have had power to keep the debentures alive for the purpose of re-issue," and "always to have had power to re-issue them either by re-issuing the same debentures or by issuing other debentures in their place." Upon such re-issue "the person entitled to the debentures" (*i.e.* in the present case the trustees for the Bank of Ireland) "shall be deemed always to have had the same right and priorities as if the debentures had not previously been issued." The re-issue in this case was carried out by transfer to and from nominees of the Company, and sub-section 2 provides that in such a case a transfer before the passing of the Act, from a nominee of the Company, "shall be deemed to be a re-issue for the purposes of this section." The section further provides, in sub-section 3, that debentures deposited before the Act to secure advances "shall not be deemed to have been redeemed by reason only of the account of the Company having ceased to be in debit," and, in sub-section 4, that a re-issue before the Act is not to be treated as the issue of a new debenture for the purposes of any provision limiting the amount or number of debentures to be issued."

(1) 2 Kay & J. 650; 6 De G. M. & G. 638.

Barton, J.
1908.

FITZGERALD
v.
PERSSE.

I can hardly regard as serious the argument that this section only authorized one re-issue. The expressed intention of the Legislature is that the Company is to be deemed always to have had power to "keep debentures alive." Neither can I accede to the argument, which was very persuasively presented by Mr. Herbert Wilson, that the effect of the concluding words of sub-sect. 1 is to give the re-issued debentures priority only as of the date of re-issue. The words "as if the debentures had not previously been issued" refer back, I think, to the words "previously issued" at the commencement of the section, and merely mean "as if the debentures were being issued for the first time."

There remains the point which was made on behalf of the second debenture holders. The section makes certain exceptions from its operations, one of which runs as follows:—"Unless the debentures have been redeemed *in pursuance of any obligation on the company so to do* and not being an obligation enforceable only by the person to whom the redeemed debentures were issued." I have no doubt that this exception was introduced for the protection of, among others, second debenture holders. The provisions of a trust deed or the conditions contained in the debentures themselves frequently impose an obligation on a company to redeem debentures at some date or dates or upon the happening of some event or events. In the present case nothing of that kind is alleged. What the second debenture holders rely upon is a passage in their prospectus which was to the effect that a temporary loan had been obtained from the Company's bankers, and that the issue was made for the purpose *inter alia* of repaying this loan. Nothing, be it observed, was said in the prospectus about redeeming any first debentures. On the contrary, it was clearly stated in the prospectus, as well as in the conditions on the debentures, and in the trust deed, that this issue of second debentures was to be puisne and subject to the whole of the former issue of £100,000 first debentures. The loan to the Bank was repaid out of the proceeds of the issue; and 137 first debentures which had been security for the loan were afterwards re-transferred from trustees for the Bank to nominees of the Company. Were these debentures redeemed in pursuance of any "obligation so to do" within the meaning of the exception in sect. 15?

Barton, J.
1908.
FITZGERALD v. PERSSE.

A statement in a prospectus (where debentures are afterwards issued and secured by a trust deed) does not, as a general rule, create a direct contractual obligation. The prospectus, in such a case, is not necessarily part of the debenture contract: see *per* North, J., in *In re Chicago and North-Western Granaries Co., Ltd.* (1). The debenture contract ordinarily consists of the debentures themselves, fortified by the trust deed. But a prospectus is an invitation to contract; and a statement in a prospectus, if it misleads subscribers and fulfils other requisite conditions, may give rise not only to remedies against directors personally, but also to a right to rescind, and may in that way impose on a company a correlative obligation. I assume, without finding it necessary to decide the point, that an obligation of that kind, if it could be shown to have been created, would be an "obligation so to do" within the meaning of the exception in sect. 15. In the present case it is not suggested that any subscribers to the second debenture issue were aware that any first debentures were security for the Bank loan, or that they acted on any representation that it was a purpose of the issue to redeem any first debentures. On the contrary, it is admitted that the second debenture holders subscribed on the basis and understanding that their security was to be puisne and subject to the whole of the first debenture issue. The contention on behalf of the second debenture holders is of a somewhat artificial kind, and comes to this—that, because in the then state of the law payment of a loan of this kind entailed (as a legal consequence) the redemption and extinguishment of any debentures that were security for the loan, an obligation to repay the loan entailed an obligation to redeem such debentures. That argument seems to me to confound acts *per se* obligatory with their legal consequences. The obligation (if any) imposed by the statement in the prospectus was only to repay the loan. Although repayment of the loan might have entailed a redemption of debentures, the latter would not have been *per se* an enforceable obligation. But if there is any substance in this contention, it is, I think, disposed of by the retrospective provisions of sect. 15 of the recent statute, which in effect enacts that in past transactions

(1) [1898] 1 Ch. 263, 266.

the mere repayment of a loan of this kind is not to be deemed to have entailed (as a necessary legal consequence) the redemption of the debentures which were security for the loan. It might have been different if there had been in the prospectus a direct representation to the effect that any first debentures were to be redeemed. But there was no such representation. In fact, there was, as has already been pointed out, a representation to the contrary effect.

I am of opinion that these 143 re-issued debentures have not lost their original priority as first debentures.

Solicitors for the Receiver, Sir R. Gardner: *D. & T. Fitzgerald.*

Solicitors for the plaintiff: *Murphy & Mallins.*

Solicitors for the defendants, the trustees for the debenture holders: *Casey & Clay.*

Solicitors for the second debenture holders: *Lett & Fetherstonhaugh.*

Solicitor for the Bank of Ireland: *C. J. Rutherford.*

W. M'G.

Barton, J.
1908.

Jan. 27.
Feb. 7.

BRADSHAW *v.* BRADSHAW.

Will—Construction of—To be held by her for her own use, and for the use of children—Life estate with remainder, or joint tenancy.

A testator, by his will, left his property to his wife, "to be held by her for her own use, and for the use of any children which have sprung or may spring from our marriage. She has a right to divide the above possessions among her offspring which may be descendants of mine":—

Held, that the wife took an estate for life, with a power of appointment among children and remoter descendants.

ORIGINATING SUMMONS.

Humphrey Bradshaw by his will thus disposed of his property:—"I leave to my wife . . . . all the securities, properties, and possessions I hold in this world, to be held by her for her own use and for the use of any children which have sprung or may spring from our marriage. She has the right to divide the above possessions among her offspring which may be descendants of mine." The testator died in September, 1907, and probate was granted to his wife, Louisa Jane Bradshaw. The matter came before the Court on an originating summons, asking to have it determined whether the widow of the deceased became entitled to a life estate with remainder in default of appointment to her children, or whether she and her children became absolutely entitled as joint tenants or tenants in common.

Macrory, for the petitioner:—

The wife of testator takes a life estate with a power of appointment among her children. To hold this would most nearly effectuate the intentions of the testator. The words used in *Newill* v. *Newill* (1) were different, and there was nothing there,

(1) L. R. 12 Eq. 432; L. R. 7 Ch. 253.

as there is here, to indicate that the ordinary construction of a gift to wife and children as a joint tenancy was not to be followed. *Crockett* v. *Crockett* (1) is in favour of the construction of the gift as a life estate, the suggested alternative of a trusteeship in the wife with large discretionary powers not having been approved of since. That under similar words the wife took a life estate was held in *Armstrong* v. *Armstrong* (2), and *Mill* v. *Mill* (3). The Court will lay hold of any circumstance, however slight, which will enable it to construe the gift as an estate for life to the wife, with remainder to the children: *Newill* v. *Newill* (4); *In re M'Vicker's Contract* (5). In this case the fact that the wife is given a power of appointment over the whole amongst her children is a sufficient circumstance for the purpose: *Newill* v. *Newill* (4).

Gerald FitzGibbon, for the defendant:—

The wife and children take as joint tenants. The word "offspring," which testator uses, limits the gift to children to the exclusion of remoter descendants: *Lister* v. *Tidd* (6). The alternative suggested in *Crockett* v. *Crockett* (1) was approved of in *In re Byrne's Estate* (7), which was affirmed by the Court of Appeal. The argument that the gift means a joint tenancy is supported by the decision in *Curtis* v. *Graham* (8); but the case is ruled by *In re Byrne's Estate* (7).

BARTON, J.:— Feb. 7.

In this case the Court has to construe the following devise and bequest in the will of Humphrey Bradshaw: "I leave to my wife, Louisa Jane Bradshaw, formerly Hall, all the securities, properties, and possessions, I hold in this world, to be held by her

(1) 2 Ph. 553.
(2) L. R. 7 Eq. 518.
(3) I. R. 9 Eq. 104; I. R. 11 Eq. 158. [253.
(4) L. R. 12 Eq. 432; L. R. 7 Ch.
(5) 25 L. R. Ir. 307.
(6) 29 Beav. 618.
(7) 29 L. R. Ir. 250, 260.
(8) 12 W. R. 998.

Barton, J. 1908.

BRADSHAW v. BRADSHAW.

for her own use, and for the use of any children which have sprung or may spring from our marriage. She has the right to divide the above possessions among her offspring which may be descendants of mine." The question for decision is, what interest the wife and her two young children by testator take under these words. On the one hand, it has been argued that she takes a life estate with a power of appointment. On the other hand, it has been contended that the wife and children take as joint tenants, or that the wife is trustee for herself and the children, with a power of division among them.

Cases of this kind run very fine. It was pointed out in the arguments that the wording of this gift looks very like the wording of the gifts in several reported cases, *e.g.*: *Crockett* v. *Crockett* (1); *Newill* v. *Newill* (2); and *In re Byrne's Estate* (3). A reference to those cases will illustrate the fineness of the distinctions which may differentiate such gifts, and the differences of judicial opinion to which they may give rise. In *Crockett* v. *Crockett* (1) a testator by his will directed that all his property should be "at the disposal of his wife, for herself and children." Wigram, V.-C., held (at p. 554), that the mother and children took as joint tenants. Lord Cottenham, C., however, reversed this decision, being of opinion (see p. 561) that, as between herself and her children, the mother was "either trustee with a large discretion as to the application of the fund, or that she had a power in favour of the children, subject to life estate in herself." In *Newill* v. *Newill* (2) the testator gave all his real and personal estate to his wife "for the use and benefit of herself and of all his children." Malins, V.-C., held that the wife was entitled to an estate for life, with remainder to the children as joint tenants. The Court of Chancery Appeal reversed this decision, and held that the wife and children took as joint tenants. In *In re Byrne's Estate* (3) the testator bequeathed to his wife all his land in K, and bequeathed other property to her, "to be held by her for her own, and all my children's, use and benefit. But I leave it entirely in her power to fix the portion that each of my children is to get

(1) 2 Ph. 553. (2) L. R. 12 Eq. 432; L. R. 7 Ch. App. 253.
(3) 29 L. R. Ir. 250, 260.

out of my property." The case arose upon a petition for sale by an incumbrancer of the wife's estate; and it was not necessary to decide anything more than whether the wife took an absolute estate or not. Monroe, J., held not, and (at p. 259) expressed the opinion that the wife was a "trustee of this property for herself and her children, with large discretionary power of determining what shall be the children's interest when their shares come, if they ever do come, to be allotted." Monroe, J.'s, decision was affirmed on appeal; but the judgments in the Court of Appeal are not reported (1).

It seems to me that this gift, when examined closely, possesses several characteristics not common to the cases just cited. In the *first* place, the words are not "at the disposal of." "Dispose" and "disposal" are words not to be overlooked in construing gifts of property. Then, "use and benefit" is an ampler expression than the single word "use," which might be regarded as more consistent with a more limited enjoyment, *e.g.*, for life. I may observe that in this context I take the word "use" to be employed in its popular and not in its strictly technical legal meaning. In the *second* place, the gift is not for the use of the children only, but also of remoter descendants. The testator was apparently looking a long way ahead. In the *third* place, the right of division given to the wife is a right to divide the whole property, and not, as in *In re Byrne's Estate* (2), to fix the proportion of the children's shares. Then there are the words "to be held by her." They occurred in the gift in *In re Byrne's Estate* (2); and by themselves they might not perhaps have much significance. But when taken in connexion with the three points which I have mentioned, I think they aid the construction that the intention of the testator was to keep the whole property together for the use of the wife and children, with a power in the wife to divide the whole property among his children and remoter descendants.

The testator has left scanty materials for ascertaining his intention; but it seems to me that all the words of the gift are best satisfied and effectuated by holding that the widow is

(1) Court of Appeal, unreported; May 12, 1892.
(2) 29 L. R. Ir. 250, 260.

Barton, J. 1908. BRADSHAW *v.* BRADSHAW.

entitled to the whole property for life, with a power of appointment among children and remoter descendants. If the widow requires more detailed guidance as to her rights or obligations, a further question can be submitted.

Solicitors for all parties: *Whitney & Moore.*

W. M'G.

In the MATTER of the ESTATE of R. W. B. KER and OTHERS.

Wylie, J.
1908.
March 9, 10, 16.

Land Purchase Acts—Sale to tenants direct—Tenant for life who has assigned his life estate—"Landlord"—Land Law (Ireland) Act, 1887 (50 & 51 *Vict. c.* 33), *s.* 34.

A tenant for life who has assigned his life estate is a "landlord" for the purpose of a sale direct to his tenants under the Land Purchase Acts.

Question arising on the ruling of the final schedule as to who was entitled to the bonus payable pursuant to section 48 of the Irish Land Act, 1903.

Captain Ker, who was entitled as tenant for life under a compound settlement to certain lands, entered into agreements with the tenants for the sale to them direct of portion of the said settled lands, situate at Portavoe, County Down, and lodged an originating application to have said sale carried out. Prior to the making of said agreements, Captain Ker had assigned his life estate in the settled lands to William M. Rose and Robert, Lord Monkswell, the trustees of a settlement under which Mrs. Ker was entitled to an equitable life interest. By direction of the examiner, the trustees had been joined as vendors. The bonus was now claimed by the trustees, and also by a mortgagee to whom Captain Ker had assigned his interest in the bonus.

R. F. Harrison, K.C., for the trustees :—

There are two classes of sales contemplated by the Land Purchase Acts—(1) sales of holdings to the tenants direct, and (2) sales of estates to the Land Commission. In the first class of sales the vendor must be a "landlord" as defined by the Landlord and Tenant (Ireland) Act, 1870, section 70, as varied by the Land Law (Ireland) Act, 1881, section 57. Unless the vendor comes within this definition, the provisions of the Settled Land Acts do not apply.

Wylie, J. 1908.

In re Ker's Estate.

The Act of 1870 is the foundation of all sales to tenants direct. You must have a "landlord," a "tenant," and a "holding." The first time the term "vendor" occurs is in sect. 5 of the Purchase of Land (Ireland) Act, 1885, but it is then used solely in relation to sales to the Land Commission; and the jurisdiction of the Land Commission to appoint trustees for the purposes of the Settled Land Acts, conferred by section 13 of the same Act, is confined to a similar class of sales. This jurisdiction is extended by section 23 of the Land Law (Ireland) Act, 1887, to all cases where it is necessary to appoint new trustees for the purposes of any sale under the Land Law (Ireland) Acts. By section 34 of the same Act, the definition of "landlord" is extended to include any person entitled to an estate as a trustee for sale, and any limited owner as defined by section 33 of the Landlord and Tenant (Ir.) Act, 1870. By section 42 of the Land Law (Ireland) Act, 1896, a mortgagee in possession is deemed to be a "landlord" for the purposes of the Land Purchase Acts. Mortgagees not in possession have no power to sell to the tenants direct, not being "landlords" within the meaning of the Land Purchase Acts: *Redington's Estate* (1); showing that the difference is recognized between the class of persons who can sell to the Land Commission, and those who can sell to the tenants direct.

The term "limited owner" does not occur in the Land Purchase sections of the Act of 1896. "Limited owner" in section 17 (2) of the Irish Land Act, 1903, must mean "limited owner" as defined by the Act of 1870, and the term "landlord" as applied to a "limited owner" within the meaning of section 33 of that Act, does not include a tenant for life who has parted with his life estate. Accordingly, the tenant for life here is not entitled to the bonus.

Matheson, K.C., for Captain Ker:—

"Tenant for life" within the meaning of the Act of 1870 means a tenant for life whose estate is one in possession, as distinguished from one in remainder.

(1) 23 L. R. Ir. at p. 504.

Wylie, J. 1908.

In re KER'S ESTATE.

A "landlord" as defined by that Act need not necessarily be in possession. The definition in the Act of 1881 limits the term "landlord" to a person entitled to receive the rents and profits, or take possession of the land held by his tenant. The Act of 1887 extends the definition for the purpose of sales to tenants, so as to include any person entitled to an estate as a trustee for sale, and any limited owner as defined by section 33 of the Act of 1870 (which would appear to be a mistake for sect. 26). The effect of this definition is that in all subsequent cases the term "landlord" can include a person not in receipt of the rents and profits. Accordingly, a tenant for life who has parted with his life estate comes within the definition; and the Act of 1904 recognizes that a person who has the powers of a tenant for life can be a competent vendor.

Whitaker, K.C., for the mortgagee of the bonus:—

The case is covered by *In re Cramer Roberts' Estate* (1).

Herbert Wilson, K.C., appeared for the vendors.

WYLIE, J.:—

March 16.

In this case Captain Ker, as tenant for life of the settled lands under a compound settlement, entered into agreements for sale of a portion of the estate direct to the tenants, and lodged an originating application to have said sale carried out. Long prior to the making of the said agreements, Captain Ker had assigned his life interest to William M. Rose and Robert, Lord Monkswell, under which assignment the vendor's wife is entitled to an equitable life interest. I am not informed whether that assignment was made as part of or by way of any family arrangement or for value; but in either case, under sect. 50 of the Settled Land Act, 1882, such an assignment did not in any way affect the power of Captain Ker to sell; though if it were an assignment for value, he could not exercise his power without the consent of the assignee; where the assignment is part of a family arrangement the consent of the assignee is, by sect. 4 of the Act of 1890, rendered no longer neces-

(1) [1907] 1 I. R. 483; [1908] 1 I. R. 222.

Wylie, J. 1908.

In re KER'S ESTATE.

sary. But even where the consent of the assignee is necessary it does not make the assignee in any sense a vendor. No power of sale passes to the assignee, and I have already decided in *Cramer Roberts' Estate* (1) that the adding of the assignee as a vendor in such a case, by direction of the examiner, does not affect the right of the real vendor to the bonus.

But an entirely novel point has now been raised on behalf of the trustees. It is admitted that if the sale by Captain Ker had been made, under sect. 6 of the Act of 1903, to the Land Commission, instead of being made direct to the tenants, Captain Ker would have had full power to sell, and would have been entitled to the bonus; but it is contended that neither Captain Ker nor any other vendor can sell direct to the tenants under the Land Purchase Acts unless he is a "landlord" within the definition in the Act of 1881; and according to that definition he must be entitled to receive the rents and profits, or take possession of the land held by his tenant, and, as Captain Ker had assigned his entire interest, he is not a "landlord" and could not sell direct to the tenants under the Act of 1903, and, if not a competent vendor, he would not be entitled to the bonus.

Now, I think it may be admitted that, prior to the Act of 1887, no one but a "landlord" according to the above definition could sell direct to the tenants under the Land Purchase Acts. But sect. 14 of the Act of 1887 provides that where an agreement has been made between a landlord and a tenant for the sale of a holding, and the Land Commission are satisfied that the landlord and tenant are *prima facie* entitled to carry such agreements into effect, the Land Commission may carry the sale through; and sect. 34 of that Act provides that "landlord" for the purpose of sales to tenants under the Land Acts shall include a trustee for sale and any limited owner as defined by the Act of 1870. This could only mean a limited owner not entitled to receive the rents and profits, otherwise he would have been a "landlord" without this extending clause.

The subsequent Acts, I think, make it plain that any person having a power to sell the estate can sell under the Land Pur-

(1) [1907] 1 I. R. 483.

chase Acts either to the tenants or to the Land Commission; and sect. 17 of the Act of 1903 makes no distinction between the two classes of sales as to the persons who may be dealt with by the Land Commission as the owners of the estate.

In my opinion Captain Ker is, in this case, a proper vendor and the only vendor, and, therefore, entitled to the bonus.

Solicitor for the trustees: *G. T. Harley.*

Solicitors for the vendors and the mortgagee of the bonus: *H. Wallace & Co.*

J. E. W.

IN THE MATTER OF THE ESTATE OF ROBERT PEEL DAWSON SPENCER CHICHESTER.

Will—Construction—Contingent remainder—Bankruptcy—Spes successionis *Bare possibility—Possibility coupled with an interest.*

A testatrix, in 1889, devised certain real estate to trustees, upon the following trusts—(1) to pay the rents and profits thereof to her brother, the then Marquess of D., during his life, should he not at the time of her death be, or subsequently thereto become, a bankrupt; and, upon the failure or determination of such trust, (2) to pay the said rents and profits to her brother, Lord F. C., during his life, subject to a like proviso in case of bankruptcy; and, upon the failure or determination of such last-mentioned trust, (3) to pay the said rents and profits to Lord S. C., during his life; and from and after his death to hold the said real estate "upon trust for the person who shall at the decease of the said Lord S. C. be Marquess of D., if he shall not then be, or subsequently become, bankrupt, or have done or suffered anything whereby the said rents and profits, or any part thereof, would, through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, have become vested in or payable to some other person or persons, and his heirs in tail general, according to their respective seniorities." And the testatrix directed that upon the failure or determination of the last-mentioned trust, her trustees should stand possessed of the said real estate, upon trust for the first and every other son of the said Lord S. C., successively, according to their seniorities in tail male, with remainders over.

The testatrix died on the 6th March, 1890, prior to which date the Marquess of D. mentioned in the said will had been several times adjudicated

Wylie, J. 1907.

In re CHICHESTER'S ESTATE.

a bankrupt, the last of such adjudications having been made by an order of the English Court of Bankruptcy, dated the 1st November, 1889. The said Marquess of D. obtained his discharge under the bankruptcy of 1889 on the 9th July, 1896, and, by an order of the 16th July, 1900, all his other bankruptcies then outstanding were annulled. At the date of the death of the testatrix in 1890 Lord F. C. was also an undischarged bankrupt, and Lord S. C. (father of the vendor in this matter) thereupon entered into possession of the real estate devised by the will of the testatrix, and continued in possession until his death, on the 6th March, 1901.

On the death of Lord S. C. the Marquess of D. made no claim to the estate, and the vendor thereupon entered into possession of the lands, and subsequently entered into agreements with the tenants for the sale to them of the lands, under the Irish Land Act, 1903.

The Marquess of D. died in 1904, leaving an infant son, the present Marquess of D., who was born in 1903, his heir-at-law.

On a question of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner, as to the power of the vendor to sell the estate:—

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that the late Marquess of D. took nothing under the will while a bankrupt, and his "bare possibility" of becoming "*sui juris*," and of surviving Lord S. C., was not a "possibility coupled with an interest" which could pass by bankruptcy; that on the death of Lord S. C., the Marquess of D., having then obtained his discharge from his last and only unannulled bankruptcy, became capable of taking the estate tail, and thenceforth answered the description of the "*persona designata*" to take the estate on the death of Lord S. C.; that, the Marquess of D. not having subsequently become bankrupt, the estate passed on his death to his heir in tail, and that, accordingly, the vendor had no power to sell under the Land Purchase Acts.

Beaupré's Trusts (21 L. R. Ir. 397) discussed.

QUESTION OF LAW submitted by the Estates Commissioners for the decision of the Judicial Commissioner pursuant to the provisions of section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—

By her will, dated the 10th December, 1889, the Hon. Dorcas Juliana Fanny Chichester, commonly called Lady Dorcas Juliana Chichester, gave and devised all her real estate at Dowse, otherwise Dooish, in the barony of Raphoe and county of Donegal (being the estate for sale in this matter), and all other the real estate of or to which she should at her death be seized or entitled, or over which she should at her death have any

general power of appointment or disposition by will, unto and to the use of Lord Adolphus John Spencer Churchill Chichester, commonly called Lord Spencer Chichester, and William Dawson, their heirs and assigns, upon trusts declared in the words following, that is to say—"Upon trust if my brother, the present Marquess of Donegall, shall not at the time of my death be or subsequently thereto become a bankrupt, or have done or suffered anything whereby the said rents or profits, or any part thereof, would, through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, have become vested in, or payable to, some other person or persons, to pay the said rents and profits to my said brother, the said Marquess of Donegall, during his life, or until he shall become bankrupt, or until he shall assign, charge, or incumber the same rents and profits, or any part thereof, or shall do or suffer something whereby the same or some part thereof would, through his act or default, or by operation or process of law, or otherwise, if belonging to him, have become vested in or payable to some other person or persons; and, after the failure or determination of the trust hereinbefore contained in favour of my said brother, upon trust, if my brother Henry Fitzwarrine Chichester, commonly called Lord Fitzwarrine Chichester, shall not at the time of my death be or subsequently thereto become a bankrupt, or have done or suffered any such act or thing as aforesaid, to pay the said rents and profits to my said brother, Lord Fitzwarrine Chichester, during his life, or until he shall become a bankrupt, or assign, charge, or incumber the same rents and profits, or any part thereof, or do or suffer any such act or thing as aforesaid; and, after the failure or determination of the trust hereinbefore contained in favour of my said brother, Lord Fitzwarrine Chichester, upon trust to pay the said rents and profits to the said Lord Spencer Chichester, during his life, and from and after his death my trustees or trustee shall stand possessed of the said real estate hereinbefore devised upon trust for the person who shall at the decease of the said Lord Spencer Chichester be Marquess of Donegall, if he shall not then be or subsequently become bankrupt, or have done or suffered anything whereby the said rents and profits, or any part thereof, would through his act or default, or by operation or process of law, or otherwise, if belonging absolutely

Wylie, J. 1907.

In re CHICHESTER'S ESTATE.

to him, have become vested in or payable to some other person or persons, and his heirs in tail general, according to their respective seniorities; and, upon the failure or determination of the trust lastly hereinbefore contained, my said trustees or trustee shall stand possessed of the said real estate upon trust for the first and every other son of the said Lord Spencer Chichester successively, according to their seniorities in tail male," with remainders over.

The said testatrix died on or about the 6th March, 1890, without having revoked or altered her said will, save by a codicil dated the 30th January, 1890, which did not affect the devise hereinbefore stated; and the said will and codicil were on the 2nd September, 1890, duly proved in the Principal Probate Registry in England, and the probate thereof was on the 14th January, 1891, resealed with the seal of the Principal Probate Registry in Ireland.

Prior to the death of the said testatrix, the Right Hon. George Augustus Hamilton, then Marquess of Donegall, had been several times adjudicated a bankrupt in England, the last of which adjudications was made by an order dated the 1st November, 1889, in the matter of the High Court of Justice in Bankruptcy entitled "*Re* the Hon. George Augustus Hamilton Chichester, commonly known as the Earl of Belfast.—No. 1328 of 1889."

By an order made in the said matter on the 9th July, 1896, the said Marquess obtained his discharge under the said bankruptcy of 1889, and by an order dated the 16th July, 1900, all the other bankruptcies then outstanding were annulled.

At the date of the death of the said testatrix the said Lord Fitzwarrine Chichester was also an undischarged bankrupt, and the said Lord Spencer Chichester accordingly entered into the receipt of the rents and profits of the said lands, and so continued down to his death, which took place on the 5th March, 1901.

The above-named vendor is the eldest son of the said Lord Spencer Chichester.

On the 16th July, 1900, as aforesaid, all the bankruptcies outstanding against the said Marquess of Donegall were annulled, and between that date and his death no other bankruptcy petitions were presented against his estates.

On the death of the said Lord Spencer Chichester, Robert

Charles Ponsonby, as a trustee of the said will, made inquiries from the said Marquess with regard to his bankruptcies, and the said Marquess then informed the said Robert Charles Ponsonby that he had not yet got rid of them; and the above-named vendor was accordingly allowed to enter into the receipt of the rents and profits of the said lands.

Notwithstanding that in fact the bankruptcies of the said Marquess were annulled or discharged prior to the death of the said Lord Spencer Chichester, and that no new petitions were presented, the said Marquess never made any claim to the said lands, though he was well aware of the terms of the said will. He was absolutely insolvent at the death of the said Lord Spencer Chichester, and so continued up to his death, which took place on the 13th May, 1904.

The said Marquess left an only son, Edward Arthur Donald St. George Hamilton Chichester, Marquess of Donegall, who was born on the 7th October, 1903.

The following question was submitted:—On the true construction of the said will, in the events which have happened as above stated, is the above-named vendor a person having power to sell under the Land Purchase Acts?

Ronan, K.C., D. S. Henry, K.C., Macrory, and *Gaussen*, for the vendor.

Jellett, K.C., and *Gerald FitzGibbon*, for the infant Marquess of Donegall.

WYLIE, J. (after stating the facts):—

The question submitted to me in this case is whether, on the true construction of the will of Lady Dorcas Juliana Chichester, and in the events that have happened, the vendor is entitled to the lands for sale in this matter?

The contention of the vendor is that, under the circumstances stated, the lands would, at the death of Lord Spencer Chichester, if they had belonged to the then Marquess of Donegall, have become vested in his trustee under the bankruptcy of 1889. On the other hand, the present Marquess contends (1) that the gift in

Wylie, J. 1907.

In re CHICHESTER'S ESTATE.

the will to the person who should, at the death of Lord Spencer Chichester, be Marquess of Donegall did not, during Lord Spencer Chichester's life, confer such a contingent estate as would vest in the trustee in bankruptcy, but a mere expectancy, or *spes successionis*, which would not pass to the trustee; and (2), that even if the interest conferred was such a contingent estate or interest as would pass to a trustee in bankruptcy, it vested, in this case, in the trustees or assignee under one of the bankruptcies prior to that of 1889, and that, on their annulment in 1900, it reverted to the late Marquess and not to the trustee under the bankruptcy of 1889.

Now, it is impossible to construe this will apart from the facts of the case. There was, at the date of the will, as appears by the will itself, and also at the death of the testatrix, a Marquess of Donegall who, if he should survive Lord Spencer Chichester would, at the death of the latter, be Marquess of Donegall, and the person entitled to the lands under the devise if the forfeiture clause did not apply. The only contingency, therefore, affecting the interest of the late Marquess was his surviving Lord Spencer Chichester. *His* interest was not a mere expectancy, or *spes successionis*, such as would, under the devise, be taken by any subsequent Marquess. I think, on the facts, the will must be construed as if it ran, "and after the death of Lord Spencer Chichester, upon trust for the present Marquess of Donegall if he be then living, but if he be then dead, for the person who shall then be Marquess of Donegall."

In my opinion, the estate or interest taken under the will by the late Marquess was, apart from forfeiture, such a contingent estate as would pass to his trustee under the bankruptcy of 1889, unless the prior bankruptcies prevented this. So the second contention on behalf of the present Marquess is this, that upon the death of the testatrix in 1890, this contingent estate of the late Marquess vested in the assignee or trustee in the earliest bankruptcy then open, and that on the annulment of that bankruptcy in 1900, it reverted to and vested in the late Marquess, and not in the trustee in the bankruptcy of 1889. But in both the Bankruptcy Acts of 1869 and 1883, the words in the section dealing with annulment are, that "the property of the bankrupt shall, on

annulment . . . . revert to the debtor for all his estate and interest therein"; and, in my opinion, until all the creditors who proved in the bankruptcy of 1889 were satisfied, the debtor had no estate or interest in this property.

It does not appear to me to be material to decide in which of the trustees of the several bankruptcies this property vested in 1890, because it seems to me that any interest that the bankrupt had, prior to his discharge under the bankruptcy of 1889, in any property vested in the trustee of an earlier bankruptcy, whether arising from there being a surplus after payment of debts, or from the bankruptcy being closed, or from annulment or otherwise, would vest, like any other property of the debtor, in the trustee of the later bankruptcy, and, therefore, in my opinion, if the trustee in the bankruptcy of 1889 had not, as I must assume, at the date of the death of Lord Spencer Chichester, sufficient property of the late Marquess in his hands to discharge all claims in that bankruptcy, the forfeiture clause in this will became operative, and the vendor is entitled to the lands, and has power to sell.

I only wish to add that, though I have not occupied time in referring to the cases cited by counsel, I have carefully looked into these cases as well as others, and have only thought it necessary to state the conclusion at which I have arrived.

J. E. W.

The trustees of the infant Marquess appealed (1).

Gerald FitzGibbon (*Jellett, K.C.*, with him), for the appellants :—

The will of Lady Dorcas Chichester conferred no life estate in the lands upon either the late Marquess of Donegall or Lord Fitzwarrine Chichester, owing to their respective bankruptcies; they forfeited no interest, because they took none; and, on the

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

In re CHICHESTER'S ESTATE.

death of the testatrix, the limitation to Lord Spencer Churchill, for his life, took immediate effect. The will cannot be construed by the interpolation of the words suggested by Wylie, J.: *Lord Dungannon* v. *Smith* (1). The limitation to "the person who shall at the decease of the said Lord Spencer Chichester be Marquess of Donegall," was a limitation to a person who was not ascertained, and who could not be ascertained until the death of Lord Spencer Chichester; it created, therefore, not a possibility coupled with an interest, but a bare possibility. The possibility was, moreover, one in "a double event," as the late Marquess might not have survived Lord Spencer Chichester, and might never have been discharged from all his bankruptcies. Such a possibility could not pass to assignees in bankruptcy; it does not come within the definition of "property" in sects. 44 and 168 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): *Carleton* v. *Leighton* (2); *Moth* v. *Frome* (3). The decision in *Higden* v. *Williamson* (4) depended upon the words of 13 Eliz. c. 7, s. 2, which enacted that the Commissioners shall be empowered to assign over all that the bankrupt "might lawfully depart withal": *Dursley* v. *Berkeley* (5); *Earl of Belfast* v. *Chichester* (6); *Gibbins* v. *Eyden* (7); *Clowes* v. *Hilliard* (8); *Stockley* v. *Parsons* (9). *In re Beaupré's Trusts* (10) will be relied on by the other side; but it depended on the Married Women's Property Act, 1882, sect. 5, and not on the law of bankruptcy. It should, moreover, not now be followed: *Stockley* v. *Parsons* (9).

On the death of Lord Spencer Chichester in 1901, the Marquess of Donegall, having then obtained his discharge under the bankruptcy of 1889, and all his other bankruptcies having been annulled, became capable of taking the estate tail, which is now vested in his heir, the infant Marquess. That the bankruptcy of 1889 was not annulled is immaterial: *White* v. *Chitty* (11).

(1) 12 Cl. & Fin. 546.
(2) 3 Mer. 667.
(3) 1 Amb. 394.
(4) 3 P. Wms. 132.
(5) 6 Ves. 251.
(6) 2 Jac. & Walker, 439.
(7) L. R. 7 Eq. 371.
(8) 4 Ch. D. 413.
(9) 45 Ch. D. 51.
(10) 21 L. R. Ir. 397.
(11) L. R. 1 Eq. 372.

Ronan, *K.C.*, and *Macrory* (with them *Henry*, *K.C.*, and *Gaussen*), for the respondent :—

Appeal. 1907.

In re CHICHESTER'S ESTATE.

We contend that the will of Lady Dorcas Chichester vested a valid contingent remainder in the late Marquess of Donegall. No doubt the person who would be Marquess of Donegall on the death of Lord Spencer Chichester could not be ascertained until the happening of the event; but that is immaterial. The very example of a contingent, as distinguished from a vested, remainder, given in Williams' Real Property (20th ed., p. 350), is a gift to an unascertained person. This remainder comes within the fourth class mentioned by Fearne, namely, "a remainder limited to a person *not ascertained*, or not in being, at the time when such limitation is made": *Thorpe* v. *Thorpe* (1). An interest of this nature comes within the description of property, present or future, in sect. 168 of the Bankruptcy Act, and must pass to assignees in bankruptcy. We rely on *Higden* v. *Williamson* (2). Sect. 22 of the Irish Fines and Recoveries Act, 1834 (4 & 5 Wm. 4, c. 92), empowers a person to dispose of every estate and interest in lands although not vested, except a mere *spes successionis* as heir-at-law. This distinguishes the present case from those in which property is held not to pass to assignees in bankruptcy by reason of the bankrupt himself not having any disposing power over it. The case is ruled by the decision of this Court in *Beaupré's Trusts* (3).

If we are right in our contention that the late Marquess of Donegall took a contingent remainder under the will which would vest in his assignees in bankruptcy, it is obvious that the bankruptcy clause in the will took effect to prevent the vesting of the estate, and that the vendor has now power to sell the lands.

FitzGibbon replied.

THE LORD CHANCELLOR:—

Appeal. 1908. Jan. 27.

Lord Justice FitzGibbon will deliver the judgment of the Court.

(1) 32 L. J. (N. S.) Ex. 79. (2) 3 P. Wms. 132. (3) 21 L. R. Ir. 397.

Appeal. 1908.

In re CHICHESTER'S ESTATE.

FITZGIBBON, L.J.:—

This case comes before us in a summary way on appeal from the decision of Wylie, J., on a question submitted by the Estates Commissioners, whether R. P. D. Spencer Chichester has power to sell certain lands as a "Vendor" under the Land Purchase Acts. The decision will rule, so far as this Court is concerned, the title to all the real estate of Lady Dorcas Chichester, part of which Spencer Chichester has agreed to sell to tenants. Wylie, J., has decided that he is a competent vendor, and the appeal is brought on behalf of the infant Marquess of Donegall, claiming to be now entitled to the lands as tenant in tail in possession.

The decision depends upon the application to the terms of the will of Lady Dorcas, which bears the hall-mark of Lincoln's Inn, and to the pecuniary circumstances of certain members of the Donegall family, of the Law of Bankruptcy, and of the subtle distinction, in the Law of Contingent Remainders, between "a possibility coupled with an interest," which would pass to assignees in Bankruptcy, and a "bare possibility," which would not do so until vested in possession.

The judgment of Wylie, J., discusses some points which were not opened before us, and which do not arise when the dates and facts are correctly stated.

Lady Dorcas Chichester was the sister of Edward, the late Marquess of Donegall, the father of the present claimant. By her will, dated December 10, 1889, she appointed her brother, Lord Spencer Chichester, and William Dawson, of Lincoln's Inn, to be trustees of her will, and she devised all her real estate at Dooish, in Donegal (which included the lands in question), and all other her real estate, unto and to the use of the said trustees, their heirs and assigns, upon certain trusts. This devise gets rid of the casuistical question discussed in former times, as mentioned by Williams (Law of Real Property, p. 327), whether the inheritance, pending the vesting of contingent remainders, is *in nubibus* or elsewhere. We have to deal, under this scientifically-drawn will, with equitable and beneficial estates only.

I quote the trusts so far as material. The first is in these terms:—

"Upon trust, if my brother the present Marquess of Donegall *shall*

not at the time of my death be a bankrupt, to pay the rents and profits to my said brother during his life or until he shall become bankrupt."

The next trust is as follows:—

"After the failure or determination of the trust in favour of my said brother, if my brother Lord Fitzwarrine Chichester shall not at the time of my death be a bankrupt, to pay the said rents and profits to him during his life or until he shall become a bankrupt; and after the failure or determination of the said trust in favour of my brother, Lord Fitzwarrine Chichester, upon trust to pay the said rents and profits to Lord Spencer Chichester during his life."

After these three successive life trusts for her brothers, the trusts upon which the question now arises are declared in these terms:—

"Upon trust for the person who shall at the decease of the said Lord Spencer Chichester be Marquess of Donegall (if he shall not then be or subsequently become bankrupt), or have done or suffered anything whereby the said rents and profits would, if belonging absolutely to him, have become vested in or payable to some other person or persons, and his heirs in tail general, according to their respective seniorities. And upon the failure or determination of the trust lastly hereinbefore contained my trustees shall stand possessed of the said real estate, upon trust for the first and every other son of the said Lord Spencer Chichester successively, according to their seniorities in tail male, with remainder in tail general, with remainder to Lord Spencer Chichester in fee-simple."

The present vendor is the first son of Lord Spencer Chichester, and therefore, to take the estate, he must show that the trust for the person who at the death of Lord Spencer Chichester was Marquess of Donegall (*i.e.* the appellant's father) and his heirs in tail general, failed or has determined.

The testatrix died on March 6, 1890. At her death her brother, the then Marquess of Donegall, was a bankrupt; he had in fact been several times adjudicated a bankrupt, and neither had he been discharged, nor had any of his bankruptcies been annulled; therefore he did not answer the description in the will under which alone he could take an estate for his life; the trust for him never took effect, because at the time named in the will, when it would

Appeal. 1908.

In re CHICHESTER'S ESTATE.

Fitz Gibbon, L.J.

otherwise have vested in him in possession, he was a bankrupt, and was therefore *per formam doni* incapable of taking it.

We have nothing to do with forfeiture or reverter, because the will was so drawn as to prevent any property estate or interest from passing to the late Marquess; he had not even a possibility of taking anything—if and so long as the rents and profits were not receivable by himself, absolutely and beneficially.

Lord Fitzwarrine, the second life tenant, also was a bankrupt when the testatrix died, and therefore, on March 6, 1890, by the failure of the previous limitations, Lord Spencer Chichester, became, and during his life he continued to be, entitled to the rents and profits as *cestui que trust* in possession. The trusts for the Marquess and for Lord Fitzwarrine having failed to vest at the appointed time, could not afterwards be revived, and Lord Spencer having become life tenant in possession, could not be displaced by annulment of his brother's bankruptcies or otherwise.

Before considering what happened on Lord Spencer's death, I must point out that precisely the same disability—the same failure to answer the description, or to satisfy the condition in the will—which prevented the Marquess from taking the life interest at the death of the testatrix, prevented him from taking anything under the remainder in tail. No estate, interest, or property, present or future, vested or contingent, could pass to him as tenant in tail, or through him to his assignees in bankruptcy, so long as he was bankrupt—because the Marquess who was to take in tail on Lord Spencer's death was only to take as the then Marquess, *if not then bankrupt.* This gives a clear ground of decision, apart altogether from the second point argued before us—namely that the remainder in tail was only a "bare possibility" until Lord Spencer died, because until that event happened the person could not be ascertained who would *then* be Marquess of Donegall.

If we read the gift as being a gift to the late Marquess even by name, or as if the words were "to my brother the present Marquess," as in the life-gift, it must be qualified by the words "if he shall not then be bankrupt." This condition is an essential *part of the description* of the devisee in tail, and so long as the Marquess was bankrupt he could himself take nothing, and nothing could

pass through him to his assignees. If he had remained bankrupt until Lord Spencer died, the remainder in tail would have shared the fate of the life-trust, and would have failed exactly as it had done. Metaphorically speaking, the bankrupt Marquess was a *person unborn* for the purposes of the will, and he came into being as a *persona designata* for the first time only when he ceased to be a bankrupt, and thereby became capable of taking the expectancy in tail. But if at any time before Lord Spencer died the Marquess ceased to be bankrupt within the meaning of the will, his assignees would be out of it, and whenever Lord Spencer died, the then Marquess, if not then a bankrupt, would answer the description, would realise the expectancy, and would take the remainder in tail, which would then vest in possession. This is the event which happened.

Lord Spencer died on March 5, 1901. The memorandum states that on his death the trustee of the will made inquiries from the Marquess with regard to his bankruptcies, and he informed the trustee that "he had not yet got rid of them." Being still "absolutely insolvent," he possibly did not realize any change of *status*, but, however it happened, Lord Spencer's eldest son, the present "Vendor," was allowed to enter into receipt of the rents and profits, and his title was not challenged until after the death of the late Marquess, when the claim on behalf of the infant appellant was put forward. Inquiries appear to have been made with the result stated in the memorandum—

> "On July 16, 1900, all the bankruptcies then outstanding against the said Marquess of Donegall were annulled; and between that date and his death no other bankruptcy petitions were presented against his estates."

This statement has been qualified at the bar; and we are told, and we assume, that his last bankruptcy was not actually annulled until July 9, 1901, but that he had been "discharged" from it, and all the others had been annulled, before Lord Spencer died.

There is no distinction between discharge and annulment for the purposes of a bankruptcy clause such as that in the will before us. This was not disputed, but if authority be needed, I refer to

Appeal. 1908. *In re* CHICHESTER'S ESTATE. Fitz Gibbon, L.J.

White v. *Chitty* (1) where Lord Hatherley shows how Courts have stretched the words of testators in such cases in order to effectuate the intention, which, he says, "amounts only to this—that the property intended for the objects of his bounty shall not pass to a stranger."

Accordingly, in Lord Spencer's lifetime, the then Marquess, on his discharge from his last and only un-annulled bankruptcy, became capable of taking the estate tail, and thenceforth answered the description of the "*persona designata*" who was to take it on Lord Spencer's death. That event happened on March 5, 1901, whereupon, not being bankrupt, the then Marquess took the estate to himself and his heirs in tail general, and he not having subsequently become bankrupt, it passed on his death to the appellant, his only son and heir in tail.

The statement made by the Marquess to the trustee, and the entry of Lord Spencer's son, could not affect the title of the infant Marquess; the present vendor has not acquired any title in the meantime, accordingly the order of Wylie, J., must be discharged. The question on the memorandum must be answered in the negative; this proceeding having been taken by Mr. Robert Chichester as vendor for his own benefit under a claim of title which fails, he should pay the costs of the infant Marquess on the appeal. The order of the Court below as to costs, having been made by consent, will stand.

Though this decision is conclusive, so far as the opinion of this Court is concerned, it does not finally bind the estate, as the opposite conclusion might in effect have done, this being a summary proceeding under the Land Purchase Act, which enables the Land Commission to convert land into money irrevocably on what is called a *prima facie* title, though that title might afterwards be held bad in an action on the title.

Holding as we do, on the will, that the late Marquess took nothing while he was a bankrupt, he can have had nothing until he was discharged—except a "bare possibility" of becoming *sui juris*. It was only a possibility in a "double event," for he might never have been discharged from his bankruptcy, and he might

(1) L. R. 1 Eq. 372.

Appeal. 1908. *In re* CHICHESTER'S ESTATE. Fitz Gibbon, L.J.

not have survived Lord Spencer. There is no trace of authority for holding that such a possibility as this is "coupled with an interest," or can pass by bankruptcy.

Having taken some trouble to examine the authorities cited, but speaking only for myself, I think that the expectancy of surviving Lord Spencer, and of being Marquess at his death, apart from the question of being bankrupt, was not "coupled with an interest," and was not an "estate" or "property" which would pass to assignees in bankruptcy, until the event happened. Though it is not necessary for the judgment of the Court to go so far, I refer to the authorities which seem to me to show that this expectancy was a "*bare possibility*" which could not pass on bankruptcy. Griffith (Bankruptcy, p. 300) says:—

> "It is well settled that a bare possibility of succession, such as that of an heir at law or *devisee*, does not pass under a bankruptcy, unless the possibility becomes an actual interest prior to certificate or order of discharge."

Preston (Estates, vol. 1, p. 75) said in 1820:—

> "A contingent interest does not give any *certain*, nor any immediate right, nor any estate, in the land; it gives a mere possibility: a possibility which is coupled with an interest, when the person is fixed and ascertained; and such possibility coupled with an interest may pass by bargain and sale of Commissioners of Bankruptcy. But (p. 76) these possibilities to persons not ascertained, as to children who shall be living at the death of their surviving parent or the like contingency, are *not coupled* with an interest, and though such a possibility may be bound or extinguished at law or in equity, yet the possibility is not—it is apprehended—transferable to assignees under a Commission of Bankruptcy."

Powers of disposition in such cases have since been extended by the Fines and Recoveries Act and otherwise (Kisbey, p. 68); but the law of bankruptcy has not been changed.

It is remarkable that in Ireland the "property" which passes on bankruptcy is not defined in the Act either of 1857 or of 1872. In England it has been repeatedly defined—under the Act of 1869, sect. 4, it includes "every description of property whether real or personal," and also "every description of estate, interest, and profit, present or future, vested or contingent, arising out of

Appeal. 1908. *In re* CHICHESTER'S ESTATE. Fitz Gibbon, L.J.

or incident to property as above defined." The Act of 13 Eliz. c. 7, empowered the Commissioners to assign over "all that the bankrupt might depart withal." *Higden* v. *Williamson* (1), cited (by Mr. Ronan), which held a devise to such of the children of A as should be living at his death to be assignable in bankruptcy was decided under that Act in 1731, but it appears from *Moth* v. *Frome* (2) that the Act of 5 Geo. 2, c. 2, was passed in 1732 in consequence of that decision, and it defined what was to pass in these words—

> "All such effects of which the party was possessed or interested in, or whereby he hath, or may *expect* any profit, possibility of profit, benefit, or advantage whatsoever."

We must remember these comprehensive words when we read the line of cases on which the rules laid down in Preston and in Griffith are founded. In *Moth* v. *Frome* (2) Sir J. Jekyll held that a remainder limited to a daughter on her father's death did not pass on her bankruptcy during *his* life, because she had no present possession, interest, or expectation within the Act of Geo. 2, and of her possibility as contrasted with the possibility mentioned in the Act, he said: "This is not that kind of possibility, there must be a *persona designata*."

I have already shown that the Marquess was not a *persona designata* under the will of Lady Dorcas, so long as he was a bankrupt—and, in my opinion, if *Moth* v. *Frome* (2) is law, he got no interest assignable on bankruptcy until Lord Spencer died, though we decide only that he had none until he ceased to be a bankrupt. In *Carlton* v. *Leighton* (3) Lord Eldon held that the expectancy of an heir, whether presumptive or apparent, was not an interest which could pass in bankruptcy, and in a note it was stated to be "no right or interest whatever."

In *Dursley* v. *Berkeley* (4), Lord Eldon held that the next-of-kin of a hopeless lunatic had no interest whatever, though he might bind his expectation or possibility by contract.

In *Belfast* v. *Chichester* (5), eighty-six years ago, Lord Eldon

(1) 3 P. Wms. 132.
(2) 1 Amb. 394.
(3) 3 Mer. 667.
(4) 6 Ves. 251, at p. 259.
(5) 2 Jac. & Walker, 439.

allowed a demurrer to a bill by the heir in tail to the dignity of Earl of Belfast to perpetuate testimony, on the ground that he had no interest, and said that the question had been left in the *Berkeley Case* to the Judges as *relating to land*, because, if evidence was not receivable as to land, *a fortiori* it could not be received as to a dignity.

In *Dungannon* v. *Smith* (1) a remainder to the heir male of a tenant for life attaining twenty-one years was held void for remoteness, because there might have been a succession of infant heirs covering more than twenty-one years. But the opinions of the Lords and of the Judges touch this case closely, because they deal with the description "attaining the age of twenty-one years" in words which equally apply to the description here—"if not a bankrupt." Tindal, C.J., says (page 614)—"The attaining of the age of twenty-one is made *part of the integral description* of every one who is to take; it is made, as it were, a condition precedent that the taker is to be twenty-one, whoever he may be." He refers to the bequest in *Tollemache* v. *Coventry* (2) "in trust for such person who from time to time should be Lord Vere"—(undistinguishable from "the person who at the death of Lord Spencer Chichester shall be Marquess of Donegall")—and he quotes from Lord Brougham:—

> "To argue from the fact that the person was *in esse* at the date of the will is to rely upon an accident. The event might have been otherwise; he would not *ex necessitate* answer the description within the allowed period."

In *Thorpe* v. *Thorpe* (3) there was a devise on the death of a tenant for life to the testator's own right heir, "if named Henry Thorpe." This is identical in construction with the description "if he shall not be bankrupt." It was held to be "a possibility on a possibility," and that although the reversion in fee was in the meantime in the testator's right heirs general, it was subject to be defeated during the life estate by the coming into operation of the devise to the heir "if of the prescribed name," a conclusion

(1) 12 Cl. & Fin. 546. (2) 2 Cl. & Fin. 611.
(3) 32 L. J. (N. S.) Exch. 79.

Appeal. 1908. *In re* CHICHESTER'S ESTATE. Fitz Gibbon, L.J.

inconsistent with the existence in any one of any estate interest or property, until the contingent limitation *came into operation* on the death of the tenant for life.

In *Davis* v. *Angel* (1) Lord Westbury, affirming Sir J. Romilly, had no hesitation in holding that no interest whatever arose under a bequest "in trust for my nephew Isaac in case he should marry my niece Esther," until the precedent event occurred, on the happening of which the bequest depended for its existence. He says (p. 529):—

> "Though the distinction is a fine one yet it perfectly exists and is easily apprehended; I mean the distinction between an interest that has arisen and is represented, and an interest that has not arisen and that never may arise, but with regard to which there is a remote possibility that the event which has not occurred and upon which it is made to hang may hereafter occur. The latter is not an interest, it is not a right; it is nothing more than a bare expectation of a future right. . . . He has no interest whatever at present. He has . . . an expectation of the possibility of a future event which, if it occurs, may give birth to an interest."

Do not these words apply to the Marquess of Donegall as he was from 1890 to 1901? His becoming *sui juris* was a possibility so remote, and his expectation of it was so dim, that he did not even realize that he had ceased to be a bankrupt, when that event "gave birth" to his interest as remainderman in tail.

In *Vizard's Trusts* (2) Turner and Knight Bruce, L.JJ., held that the object of a power of appointment under a deed had nothing more than a mere possibility which was not assignable under the Bankruptcy Act, 1861.

In *Gibbins* v. *Eyden* (3) the interest of a bankrupt husband as tenant by the curtesy in his wife's remainder in fee, though there was issue of the marriage, did not pass in bankruptcy, because his "inchoate right" was held not to accrue until she became entitled in possession, which was a year after his discharge.

In *Cloves* v. *Hilliard* (4), speaking of a trust for legatees becoming entitled to a residue on the death of the testator's

(1) 4 De G. F. & J. 524, at p. 527.
(2) L. R. 1 Ch. App. 592.
(3) L. R. 7 Eq. 371.
(4) 4 Ch. D. 413.

daughter without issue, Sir G. Jessel says: "It is a gift to a future contingent class of persons; you cannot predicate of any one that he will be a member of the class, it is, therefore, an unascertainable future contingent class, a class to be ascertained on a future event; *ergo*, it cannot be ascertained now. They have, in fact, neither a present interest nor anything beyond the expectation of a future interest. They have no interest at all, either vested or contingent."

In *Ex parte Dever* (1) the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) held that £2959 paid under a power of withdrawal in an insurance policy did not pass in bankruptcy to the insured, because *per* Lord Esher:—

> "The contingency of its (*i.e.* the power) being exercised was a mere possibility . . . and was not property of the bankrupt which passed to his trustee."

Bowen, L.J., said:—

> "It was nothing more than a chance which the bankrupt had . . . such a possibility is not 'property' of a bankrupt which passes to his creditors under section 15 of the Bankruptcy Act, 1869, or under section 44 of the Bankruptcy Act, 1883."

Fry, L.J., said:—

> "How could the interest of the husband be 'property' when it was something which could only accrue in the event of the exercise of the wife's option on a double contingency, which had not happened at the time when he obtained his discharge? How could it be said that any 'property' was vested in him at the time of his discharge? It was the mere hope of a hope that something might come to him, . . . it was a mere *spes*; and there was nothing which could vest in the trustee in the bankruptcy."

I have tried to cut down my references to this line of authorities to such passages as directly rule this case, upon the fact that, during Lord Spencer's life, the Marquess, by obtaining his discharge, became qualified as remainderman in tail to take under the will as *persona designata*. Up to that point his bankruptcy could not affect his interest, because until he was discharged he was

(1) 18 Q. B. D 660.

Appeal. 1908.

In re CHICHESTER'S ESTATE.

Fitz Gibbon, L.J.

not a "*persona designata*" at all. I have, for myself alone, expressed the opinion that the same result would have happened even if there had not been the express condition of his not being bankrupt, and if the remainder in tail had been limited simply to the person who at Lord Spencer's death should be Marquess of Donegall. But the decision of the Court is that, on the words of the will, until the late Marquess ceased to be a bankrupt, he had only the mere hope, expectancy, or possibility of becoming *sui juris*, and of thereby becoming capable of taking the remainder in tail; this did not vest in possession until Lord Spencer's death, and at that time the Marquess was no longer bankrupt.

With all respect, what we conceive to be the error in the judgment of Wylie, J., is disclosed by the paraphrase of the will on which he bases his decision. He says:—

> "The only *contingency* affecting the interest of the late Marquess was his surviving Lord Spencer Chichester; his interest was not a mere expectancy, or *spes successionis*, such as would under the devise be taken by any subsequent Marquess."

In this he forgets—(1) that if the late Marquess had not survived his younger brother, the appellant, as heir in tail and as Marquess, would have taken the estate; and (2) that the event by which the late Marquess became capable of taking the estate was that of his having, during Lord Spencer's life, ceased to "be bankrupt." If that had not happened, the estate tail would have wholly failed, and until it happened, he had not even an expectancy, nor a *spes successionis*; he had nothing but a mere possibility or chance of becoming qualified to take the estate in tail by getting his discharge. But Wylie, J., goes on:—

> "I think, on the facts, the will must be construed as if it ran 'and after the death of Lord Spencer Chichester, upon trust for *the present Marquess of Donegall, if he be then living*, but if he be then dead, for the person who shall then be Marquess of Donegall.'"

On this he bases the opinion that

> "the estate or interest taken by the late Marquess was, *apart from forfeiture*, such a contingent estate as would pass to his trustee under the bankruptcy."

This paraphrase leaves out the condition that the estate was not to be taken by the Marquess himself if he was bankrupt, and therefore that so long as he was bankrupt it could never pass to his trustee. Forfeiture is out of the case, for once incurred it could not be got rid of by subsequent discharge or annulment. This principle is illustrated here by the life estate; the Marquess never got it, because he was bankrupt at the death of the testatrix, and no subsequent discharge or annulment could divest Lord Spencer Chichester's life estate which vested on the failure by bankruptcy of the life limitations to the Marquess and Lord Fitzwarrine.

The observations of Wylie, J., as to reverter and as to "prior bankruptcies," seem to be directed to some points which have not been opened here; these are immaterial to our decision that the appellant is now entitled as heir in tail to the real estate of Lady Dorcas Chichester.

I must refer to Mr. Ronan's remarks on *Beaupré's Trusts* (1). I concurred in that decision with doubt, and my doubts have not since been diminished, but the case was decided, not upon the law of bankruptcy, but upon the construction of the Married Woman's Property Act, 1882, section 5. The Master of the Rolls had relied on *Reid* v. *Reid* (2), and the *ratio decidendi* was that the "title" of the wife to the money in question "accrued" within the meaning of the Act of 1882, from the date of the settlement, and not from the subsequent date at which the money became payable. The word "title" does not occur in any bankruptcy statute, and the date of the accruing of "title" under the Married Woman's Property Act cannot affect the applicability of the Bankruptcy Law to the "possibility" in this case. We are bound by the decision in *Beaupré's Trusts* (1), but it cannot diminish the weight of the long line of authorities which I have cited, many of which were also cited in *Stockley* v. *Parsons* (3), and which show that the interest at stake here was not affected by the bankruptcy of the late Marquess in the events which happened.

Not only the judgment of Kay, J., but also the subsequent

(1) 21 L. R. Ir. 397. (2) 31 Ch. D. 402. (3) 45 Ch. D. 51.

Appeal. 1908. *In re* CHICHESTER'S ESTATE.

judgment of Stirling, J., in *Allcard* v. *Walker* (1), following *Stockley* v. *Parsons* (2), enforce the difference between "property," "estate," and "interest" on the one hand, and "possibilities" or "expectancies" on the other, and support the conclusion at which we have arrived.

HOLMES, L.J.:—

I hope to be able to state with comparative brevity the grounds on which I concur in allowing this appeal.

Our decision depends on the view we take of the effect of the devise in Lady Dorcas Chichester's will of the lands of Dooish, in County Donegal. This devise has already been read in full; but the only portion of it which it is necessary to consider is the trusts declared on the determination of the equitable life estate given to Lord Spencer Chichester, which trusts are for the person who shall, at Lord Spencer's death, be Marquess of Donegall, if he shall not then have become bankrupt, or have done or suffered anything whereby the rents and profits or any part thereof would have become vested in or payable to some other person or persons in tail general, and upon failure or determination of this trust upon trust for the first and every other son of Lord Spencer Chichester successively in tail male. Lady Dorcas Chichester, the testatrix, died in March, 1890; and previous thereto the nobleman who bore the title of the Marquess of Donegall had been on several occasions adjudicated a bankrupt; but inasmuch as all three adjudications, except that dated the 1st November, 1889, had been annulled before the death of Lord Spencer Chichester, in March, 1901, it is admitted that they may be treated as having never existed as far as the question before this Court is concerned. The only matter argued here is the effect of the bankruptcy of the 1st November, 1889, which was not annulled before the death of the tenant for life, but from which the Marquess obtained his discharge on the 9th July, 1896.

If, previous to that date, he had acquired in the lands of Dooish, under the foregoing devise, an interest as distinguished from a bare possibility or chance of succeeding to them, such

(1) [1896] 2 Ch. 369. (2) 45 Ch. D. 51.

interest vested in the trustee of the bankruptcy, and continued to be so vested at the time of Lord Spencer Chichester's death, thus defeating the equitable remainder of the Marquess in tail. If, on the other hand, the Marquess had never before the time of his discharge, any interest as distinguished from a bare possibility under the devise, it is admitted that in the events that happened he became entitled to an estate tail on the death of Lord Spencer Chichester. The typical instance of a *spes successionis*, or expectation of succeeding to property, as distinguished from an interest therein, is to be found in cases of the heir-at-law or next-of-kin of some living person. The law is the same where there is a limitation by will or settlement of real or personal property to the heir or statutory next-of-kin of a living person. It makes no difference that the limitation is not to the actual heir or next-of-kin, but to the persons who would be heir or next-of-kin if the ancestor were to die at some future time. Until the time arrives there is no one who can say he has anything beyond a hope or expectation. It is so likewise in cases analogous to this class, such for example as the hope that the husband of a childless wife may become tenant by the curtesy of lands to which she is entitled in remainder. The industry of Lord Justice FitzGibbon has supplied me with many authorities of this kind; but I doubt if any of them give much help in solving the question before the Court; and once we pass from heirs and next-of-kin, it is difficult to refer them to any definite principle. The judgment of Wylie, J., under appeal, seems to me to have gone on narrower lines than the devise justifies. He deals with it as if the lands were given after Lord Spencer Chichester's death to the then Marquess of Donegall, and he says that this was tantamount to a gift to the Marquess of Donegall living at the death of the testatrix, if he survived Lord Spencer Chichester, and if he died previously, to whoever would be the Marquess on the termination of the life estate. I am disposed to think if the devise was confined to the person who should at the death of Lord Spencer Chichester be the Marquess, the late Marquess would, on the death of the testatrix, have taken an ordinary contingent remainder—an interest which by the Real Property Act, 1845, can be disposed of by deed, and would vest in assignees or trustees in bankruptcy.

Appeal. 1908.

In re CHICHESTER'S ESTATE.

Holmes, L.J.

But Mr. Justice Wylie seems to have overlooked the further contingency—"if he shall not then be bankrupt." Now the Marquess was a bankrupt at the death of the testatrix, and continued to be so until after the crucial date of the 9th July, 1896, when he obtained his discharge from his bankruptcy of the 1st November, 1889. During this period he could not, I think, be regarded as the person who might ultimately be entitled so as to give him an interest in the lands. No doubt he had the chance of having his bankruptcies annulled or of obtaining his certificate, in which case I think he would acquire an interest as distinguished from a possibility; but until then he had only a *spes successionis*.

I am not sure that the distinction I have sought to draw is strictly logical, but I am so impressed with the anomaly that a devise which could only vest in possession if the devisee was not bankrupt, should while he was bankrupt give him such a contingent interest in the devised property as would pass to his trustee, that I am constrained to hold that Lord Donegall had nothing beyond a mere hope or chance until he was freed from bankruptcy shortly before the death of the tenant for life. I am therefore of opinion that at the time of his death he was tenant in tail under the devise, and that therefore the appeal must be allowed.

Solicitors for the appellants: *Moore, Keily, & Lloyd.*
Solicitors for the respondent: *T. T. Mecredy & Son.*

R. ST. J. C.

IN RE FISHGUARD AND ROSSLARE RAILWAYS; EX PARTE KILKENNY COUNTY COUNCIL.

(1907. No. 1166.)

Kenny, J. (*for M.R.*) 1908. Jan. 28.

Lands Clauses Acts—Accommodation works—Enforcement of award as to—Railways (Ireland) Act, 1851 (14 & 15 *Vict. c.* 70), *s.* 21.

The award of an arbitrator, under the Railways (Ireland) Act, 1851, directing accommodation works to be executed by a Railway Company, cannot be enforced by summary petition under section 21 of the Act.

PETITION.

This was a petition by the Kilkenny County Council, entitled In the Matter of the Fishguard and Rosslare Railways and Harbour Acts, 1898 and 1900, the Railways (Ireland) Acts, 1851 and 1860, and in the Matter of the award of Henry D. M. Barton, dated 3rd May, 1902, and the accommodation works awarded the County Council of the County of Kilkenny in said award.

The material facts were as follows:—

The Fishguard and Rosslare Railways and Harbours Company, in pursuance of their special Acts above mentioned, took certain lands in the county of Kilkenny, close to the north bank of the River Suir, and about three miles east of the city of Waterford, of which the County Council of Kilkenny were owners in fee. Mr. Henry D. M. Barton, the arbitrator appointed by the Commissioners of Public Works in Ireland, pursuant to the Railways (Ireland) Act, 1851, by his award, dated 3rd May, 1902, fixed the compensation to be paid for the said lands at one shilling, and directed that the Company should "raise the pier called Glasshouse Pier 2 feet at the outer extremity, and evenly grade the surface of the same up to the level crossing."

The petitioners alleged that the Company neglected, from the date of the award, to do anything towards executing the work so

Kenny, J. 1908. *In re* Fishguard & Rosslare Railways; *Ex parte* Kilkenny Co. Council.

awarded; but that, having been called upon to carry out the said award, the Company proceeded to execute certain works at Glasshouse Pier which were not in accordance with the said award, and left the said pier in a condition dangerous to traffic. It was submitted that the award directed that the outer wall of the pier at Glasshouse throughout its whole length should be raised 2 feet from its original level, and that the ground from thence should be graded evenly up to the level crossing mentioned in the award, which had been raised 4 feet from the original level of the ground, whereas what the Company had done was to raise a part of the outer wall of the pier 2 feet to the original level only, and to graduate the inner surface of the pier up to the level crossing so insufficiently as to create a gradient of 1 in 11 between the end of the pier and the crossing. The petitioners further alleged that on the 24th August, 1907, the Company were again called upon to comply with the award by executing the works thereby directed, but had refused and still refused to do so, although the requirements of the Council in respect of the works had been fully explained to the engineers of the Company by the County Surveyor of the county of Kilkenny, and that the walls of the pier had become dilapidated in several places owing to the long delay of the Company in executing the works.

The prayer of the petition was as follows:—

1. That the Company may be directed to comply with the said award by raising the whole of the outer wall of the said pier two feet from its original coping level, and grading evenly the surface of the ground from the said wall to the said level crossing, together with the necessary supporting side walls.

2. That the Company be directed to pay £50 in and for damages for the dilapidation created by their delay in carrying out the works so directed as aforesaid.

3. That the Company be directed to pay the costs of and incidental to this petition.

Affidavits were filed in support of and against the petition. The Company denied that there had been any neglect on their part to carry out the award, and alleged that the works done by

them to the pier was sufficient. It appeared from the correspondence that the Company had offered to refer the matter back to the arbitrator, and that he was willing to entertain it, but that the County Council declined to do so.

Clancy, K.C., for the petitioners:—

The Railways (Ir.) Act, 1851 (14 & 15 Vict. c. 70), s. 21, provides that if the Company shall not deliver the certificate stating the amount of compensation to which a party is entitled, whose lands have been taken possession of by the Company, the right to have a certificate according to the provisions of the Act may at the costs and charges of the Company be enforced by any party or parties, by application to the High Court of Chancery in Ireland in a summary way by petition. The section goes on: "and all other rights and interests of any party or parties arising under the provisions of this Act may be enforced against the Company by such application as aforesaid."

It is submitted that the County Council have a right to have the provisions of the award as to the accommodation works carried out, and that this is a "right of a party arising under the provisions of the Act," and that therefore a petition is the appropriate remedy.

Chaytor, K.C. (with him *Poole*), for the Railway Company:—

The present application, which is one to enforce an award, is entirely misconceived. Section 21 of the 14 & 15 Vict. c. 70, has no application to a case of this kind. The remedy given by this section for proceeding by way of summary petition is confined to matters of procedure, such as the giving of a certificate, the payment of interest, costs, &c., and was never intended to extend to a case like the present, which is really in the nature of a writ for specific performance or for a mandatory injunction. The remedies for enforcing an award of the kind are enumerated at p. 158 of Brown & Theobald on Railways (3rd ed.), viz.: (1) By action, (2) by mandamus, and possibly (3) by action for mandamus. In any event procedure by summary petition would be extremely inconvenient in the present case, where, in all probability,

Kenny, J. 1908.

In re Fishguard & Rosslare Railways; *Ex parte* Kilkenny Co. Council.

witnesses will have to be subpœnaed, discovery of documents applied for, and possibly interrogatories administered. These very inconveniences show the section was never intended to apply to a case of this kind. The words of section 21, "all other rights or interests of any party arising under the Act," mean rights incidental to the delivery of the certificate. There is no reported case on the point, but it is submitted that if it was intended to give a summary remedy under the Act to enforce an award directing works to be executed, as contrasted with an award ascertaining a sum to be paid for compensation, there would have been some specific provision in the Act.

KENNY, J.:—

The arbitrator in this case, by his award of the 3rd May, 1902, directed certain accommodation works, which are referred to in the petition of the County Council, to be executed by the Railway Company. A long correspondence took place between the County Council and the Railway Company as to these works—the point raised by the County Council being—not that the Company have done no act to comply with the award—but that the works have been insufficiently carried out.

The only question I have to determine is:—whether the remedy by petition given by the 21st section of the Railways (Ireland) Act, 1851, is applicable in the case of accommodation works. I am of opinion that the section does not apply. The Act is in existence for over fifty-six years, and yet no reported case is to be found in which such an order as that asked for here was made or applied for. A decision on the language of the section would certainly deserve to be reported. Every lawyer knows that the procedure as to the compulsory taking of lands in Ireland differs from that which prevails in England. Though the Railways (Ireland) Act, 1851, incorporates the Lands Clauses Act, 1845, to a considerable extent, the procedure with respect to the compulsory acquisition of lands as prescribed by the Irish Act is wholly different. It provides for the lodgment by the Railway Company with the Board of Works of maps and schedules of the lands required and of the works proposed to be executed for the accommodation of lands adjoining the railway,

and for the appointment by the Board of Works of an arbitrator to adjudicate with respect to the price or compensation to be paid for the lands, and with respect to accommodation works. The arbitrator makes his draft award, to which all parties interested can object. When all objections are heard and determined, the arbitrator makes his final award. Parties dissatisfied with the award, either as to the price or compensation awarded, or as to the accommodation works directed to be executed, may object, and may have their objection disposed of by a traverse before a Judge and jury, subject to which the award is binding and conclusive. Any person who claims any right to, or interest in, the lands, then delivers an abstract of his title to the Company. If the title is clear, and it appears to the Company that the claimant is absolutely entitled, the Company delivers to him a certificate stating the amount of the price or compensation to which he is entitled under the award. Such certificate does not deal with accommodation works. It entitles the party to be paid the amount specified in it, and in case of default in payment, judgment may be entered up against the Company for the amount. The 21st section of the Act provides for enforcement of the delivery of this certificate by summary petition in the Court of Chancery. It enacts that: "If from any reason whatever the Company shall not deliver the certificate aforesaid to any party claiming to be entitled to any interest in any lands, the possession whereof has been taken by the Company as aforesaid, then the right to have a certificate according to the provisions of this Act, may, at the costs and charges of the Company, be enforced by any party or parties, by application to the High Court of Chancery in Ireland in a summary way by petition." So far the section relates to the certificate only. But then come the words on which the applicants rely: "And all other rights and interests of any party or parties arising under the provisions of this Act may in like manner be enforced against the Company by such application as aforesaid." It appears to me that these words, "all other rights and interests," refer to other rights and interests (if any) in connexion with the certificate, or possibly with the payment of the compensation. I am of

Kenny, J. 1908.

In re Fishguard & Rosslare Railways; *Ex parte* Kilkenny Co. Council.

opinion they do not extend to rights in connexion with works ordered by the award to be executed. It would be most inconvenient if the section contemplated such a substantive remedy as the right to a mandatory injunction for the execution of the works specified in the award, or for their completion in a particular way. If it gave such a remedy, it would be a substitution for a plenary suit. There is no doubt that the section is not confined to the mere ordering of the certificate: *The Cork and Youghal Railway Company* v. *Hartnell* (1); but I cannot think that it was intended to extend, or on its true construction that it does extend, to matters not *ejusdem generis* with the enforcing of the certificate. As a matter of construction I hold that the remedy by summary petition, provided for by section 21, does not apply to a claim for the execution of accommodation works under the award.

Solicitor for the petitioner: *James Harte.*
Solicitor for the Railway Company: *Croker Barrington.*

W. L.

Note.—The parties agreed to refer the matter back to the arbitrator, who was willing to entertain it, to determine the meaning of his award, and that the petition should be dismissed without costs.—[Rep.]

(1) L. R. 5 H. L. 111.

IN RE M'CAUSLAND'S TRUSTS.

(1907. No. 1250.)

Kenny, J. (*for M.R.*) 1908. Feb. 12.

Will—Residue held by executor for wrong party—Executor not express trustee for next-of-kin—Title of next-of-kin barred by Statute of Limitations.

A testator who died in 1872 devised and bequeathed his freehold and leasehold property to his daughter B, and, in the event (which happened) of her dying unmarried, to his daughter C absolutely. The gift was adeemed by the sale of the property in the lifetime of the testator. The purchase-money was invested by the testator in certain shares, which were held by him at the date of his death. The will contained no residuary bequest. The executors treated the shares as held on the same trusts as the lands, and paid the dividends to B, and after her death to D, the husband of C, who survived her. On the death of D, in 1906, his daughter E, who was personal representative of her father and mother, applied to the executor of the surviving executor to transfer the shares, which the executor declined to do, as he was advised that a question arose as to who was entitled. By consent the shares were sold, and the proceeds lodged in Court by the executor:—

Held, that the executors were not express trustees of the shares for the next-of-kin; that the title of the next-of-kin to the shares was barred by statute: and that E was entitled to the fund.

In re Lacy ([1899] 2 Ch. 149) followed.

ORIGINATING SUMMONS.

This was an application on behalf of Saressa Barbara Kathleen Warren, for transfer to her of a sum of Consols which represented funds lodged in Court under the Trustee Act, 1893, in the following circumstances:—

Marcus M'Causland, the grandfather of the applicant, made his will on December 1st, 1857. After stating that he was entitled to the sum of £1500, secured by a policy of insurance on the life of Lydia Furlong, and was possessed of several houses and other property in the city of Londonderry, he devised and bequeathed to his two sons, Abraham M'Causland and Connolly M'Causland, and to George Skipton and the survivor of them, and to the heirs, executors, and administrators of such survivor, all and singular

Kenny, J. 1908.

In re M'Causland's Trusts.

his freehold and leasehold property, and all other his real estate whatsoever and wheresoever situate, and also all his goods, chattels, moneys, securities for money, debts, and all and singular other his personal estate and effects whatsoever and wheresoever (save as thereinafter specifically bequeathed), to hold all and singular his said real and personal estate unto the said Abraham M'Causland, Connolly M'Causland, and George Skipton, and the survivors or survivor of them, and the heirs, executors, and administrators of such survivor, according to the respective natures and qualities of the said premises, upon trust, nevertheless, and for the uses, intents, and purposes thereinafter declared of and concerning the same. [Here followed trusts for his daughters as to the policy moneys.] And as to his leasehold and freehold property he devised and bequeathed the same to his daughter Sarah Esther so long as she continued unmarried; and in the event of her being married, then it was his wish that the same should be divided equally between her and his daughter Theodosia, and in the event of his said daughter Sarah Esther dying unmarried, then he devised and bequeathed all his leasehold and freehold property to his daughter Theodosia, her heirs and assigns, for ever; and as to his household furniture, he devised and bequeathed same to his daughter Sarah Esther, so long as she remained unmarried; and in the event of her being married or dying, then it was his desire that same should be equally divided between all his sons, save and except any portion thereof which might be the private property of his daughter Sarah Esther. He stated that all his plate had been already divided amongst his three daughters with his full consent, and appointed the said Abraham M'Causland, Connolly M'Causland, and George Skipton his executors. The testator died on February 7th, 1872, and his will was proved in the Londonderry District Registry by all the executors on June 19th, 1872.

Prior to the date of his death, the testator's house property in Londonderry was compulsorily acquired by the Londonderry Corporation under the provisions of the Towns Improvement (Ireland) Act, and the purchase-money was received by him and invested in the following securities, namely, eighteen Imperial Ottoman Bank shares, twelve Union Bank of Australia Bank shares, eight Fore Street Warehouse Company shares, four Bank

of Australasia shares, and two New South Wales five per cent. £100 bonds, and were so standing at the time of his death. The testator disposed of the policy moneys in his lifetime, and left no other property of any kind save the proportionate part of his pension to the date of his death. The residuary account passed by the executors in November, 1872, was prepared by Mr. Robert Knox, of Londonderry, solicitor, and contained the following statement, over the signature of the said Robert Knox :— "The leasehold and freehold property mentioned therein was taken in the testator's lifetime by the Corporation of Londonderry, under the powers contained in the Towns Improvement (Ir.) Act, and the proceeds invested in the various shares set out in the residuary account. These shares passed under the will in the way the leasehold and freehold property they represent would have done had that property not been converted into money. Miss Sarah Esther M'Causland is still unmarried, and takes only a life interest in these shares."

The residuary account also contained a declaration, signed by the three executors, that they held the residue then shown to be value for £1403 15*s.* 8*d.* for the use of Sarah Esther M'Causland for life, with remainder to Theodosia Warren, being children of the deceased. In 1873 Sarah Esther M'Causland died unmarried. After her death the Bank of Australasia, by the direction of the executors, began to pay the dividends on the said shares to Simon Warren, husband of the said Theodosia Warren, and father of the applicant, and continued to pay the same to him down to the date of his death on May 28th, 1906. Theodosia Warren died on July 27th, 1897. There was no settlement on her marriage with Simon Warren, so far as was known. The certificate of the Bank of Australasia shares was found by the applicant amongst her father's papers. There was no trace of the other shares, which it was believed had been sold by the executors, and the proceeds paid to Simon Warren in right of his wife.

Connolly M'Causland survived the other two executors, and died on March 24th, 1902, having by his will, dated December 9th, 1899, appointed Christopher B. Thring his executor, who duly proved his will. On the death of her father the applicant

Kenny, J. 1908.

In re M'Causland's Trusts.

requested Mr. Thring to transfer the shares to her, but he declined to make the transfer, as he was advised that a question arose as to who was entitled to the shares. By consent of the applicant the shares were sold and the proceeds lodged in Court by Mr. Thring under the Trustee Act, 1893, and invested in Consols. The testator left seven children, namely, the two sons appointed executors, the two daughters named in the will, and three other children. All were dead, but some of them had left children who were surviving.

Frederick Fleming, K.C., in support of the application :—

These shares would have passed under the residuary clause in the will, had there been any such. As there was none, the testator died intestate as to these shares, and his next-of-kin would have been entitled but for what has happened. They made no claim, and whatever claim they might have had is barred by statute, unless it can be shown that the executors were express trustees of the shares for the next-of-kin.

The ordinary implied trust, which affects personal estate held by an executor for the benefit of a legatee, does not prevent the statute running: *In re Rowe* (1); *In re Davis* (2). In the latter case it was said: "An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own; but such a trust does not take a case out of the statute. An executor cannot be deprived of the benefit of the statute by showing that he is a trustee; it is necessary to make out that he is an express trustee." This passage was cited by Stirling, J., in *In re Lacy* (3). There a gift to a charity failed so far as the testator's property consisted of realty or impure personalty; and it was held that the executor, who had entered into possession of the property, and received the income for the charity, was not an express trustee for the next-of-kin, and that their title to the leaseholds was barred by the statute 23 & 24 Vict. c. 38, s. 13. The declaration in the residuary account, that the executors held the residue for the use of S. E.

(1) 58 L. J., Ch. 703. (2) [1891] 3 Ch. 119. (3) [1899] 2 Ch. 158.

M'Causland for life, with remainder to Theodosia Warren, did not make them trustees for the next-of-kin : *In re Rowe* (1). Even if the executors had kept the shares for themselves, the claim of the next-of-kin would be barred : *In re Mackay* (2).

Vincent Rice, for C. B. Thring :—

The executors were trustees as well as executors. The testator appointed them trustees of his will, and they thought that they were trustees of the shares. In the residuary account they declare that they held the residue, *i.e.* the shares, for the use of S. E. M'Causland for life, with remainder to Theodosia Warren. The view that they were trustees, and not merely executors, was supported also by the fact that after the death of S. E. M'Causland, the life tenant, they still kept the shares in their own names, and only paid the dividends to Theodosia Warren. In *Lister* v. *Pickford* (3) trustees of land paid the rents and profits to the wrong persons for twenty years, believing that they were entitled. It was held that, so long as the trustees were in possession under a legal title, the statute would not run against their real *cestui que trusts*. The same principle should apply here, when the property was vested in the personal representative of the surviving trustee.

KENNY, J. :—

The testator died in the year 1872. He had house property in Londonderry which was taken by the Corporation of Londonderry under their compulsory powers. The testator received the purchase-money and invested it in certain securities, which included four Bank of Australasia shares. The testator had left this house property to his daughter, Sarah Esther M'Causland, for life, with remainder in the event of her dying unmarried to his daughter Theodosia Warren absolutely. The executors thought, as appears from the residuary account passed by them, that as the proceeds of the sale of the houses had been invested in the shares, the latter were to be held by them on the same trusts as the houses,

(1) 58 L. J., Ch. 703. (2) [1906] 1 Ch. 25. (3) 34 L. J., Ch. 582.

Kenny, J. 1908.

In re M'Causland's Trusts.

namely, for Sarah Esther M'Causland for life, with remainder to Theodosia Warren absolutely. The testator left seven children, who are all now dead. The applicant is one of the children of the marriage of Theodosia and Simon Warren. Sarah M'Causland died unmarried in 1873. Theodosia Warren died in 1897, and Simon Warren died in 1906. After the death of Sarah M'Causland the Bank of Australia, by the direction of the executors, paid the dividends to Simon Warren down to the date of his death in 1906. All the executors are dead, and Mr. Thring is the executor of the surviving executor, and therefore now legally represents the personal estate of the testator, M'Causland. Counsel who appeared for Mr. Thring stated the possible contention that might be put forward by the next-of-kin, and which led to the question being raised as to the applicant's right to the shares. He argued that the executors were trustees of the Bank shares for the next-of-kin. The case of *In re Lacy* (1) is an authority for the proposition that executors are not—unless under special circumstances, which, in my opinion, do not exist here—express trustees for next-of-kin. I regard the present case from the point of view of the next-of-kin claiming against both the applicant and Mr. Thring as representing the personal estate of Marcus M'Causland; and I am of opinion that such claim is barred, and that the applicant is entitled to the fund in Court, subject to the payment of duties to the Crown, if any.

Solicitors: *Cathcart & Hemphill.*

W. L.

(1) [1899] 2 Ch. 158.

ALDRITT *v.* MACONCHY AND OTHERS (1).

(1904. No. 1010.)

Appeal. 1906. Nov. 5–9, 14–16. Dec. 17.

Mortgage—Fraud—Constructive notice—Independent solicitor—Purchase for value.

A., who, from his boyhood, was a person of dull intelligence, indolent habits, and, in manhood, led a secluded and inexpensive life (but as to whom the Court held that, during the period when the impeached transactions took place, there was no evidence showing him to be an idiot, or incapable of executing deeds), came into possession, in 1880, of an unincumbered estate, yielding a profit rent of about £630. F., who had been agent to A.'s father, was continued in that capacity by A. In the year 1884 the property was subject to admittedly valid mortgages for £3000 and £781. By indenture of the 17th April, 1884, A. mortgaged all his property to F. to secure advances to be made by F. as his land agent or manager up to £1000. By deed of conveyance, dated the 22nd September, 1892, reciting the preceding mortgages, and that £1000 was due to F. on his mortgage, besides £653 alleged to be due on foot of accounts stated and settled between A. and F., A., in consideration of the release by F. of all his claims, in pursuance of a recited agreement to that effect, conveyed all his property to F., and in further consideration of an annuity of £200 for his life, charged on the property, and the use for his life of the dwellinghouse on part of it, which F. covenanted to keep in repair; but the deed contained a proviso that the mortgage of the 17th April, 1884, was to remain existing. A. afterwards became surety for F. on bills and notes to the N. Bank, constituting about one-sixth of F.'s indebtedness to the Bank. F., representing that the Bank was pressing for payment, induced A. to agree to postpone his rentcharge to his own liability to the Bank. But by deed of mortgage to the Bank, dated 21st August, 1896, reciting the previous mortgages, and that F.'s mortgage of the 17th April, 1884, was subsisting, and £1000 due thereon, A. being made a party to the deed, F. assigned to the Bank his mortgage for the full sum of £1000, and A. and F. mortgaged all the property to the Bank by demise for the purpose of postponing all A.'s rights and claims, not merely to his own liability as F.'s surety, but to all F.'s liabilities on his account with the Bank, for which the mortgage was at the Bank's pleasure to be a continuing security. A. had the benefit, in connexion with the transaction of 1892, of the advice of an eminent firm of Dublin

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

ALDRITT v. MACONCHY.

solicitors, who, however, did not apparently fathom F.'s capacity for fraud, or A.'s ineptitude to resist it:—

Held, by the Court of Appeal, affirming the judgment of Ross, J., that the deeds of 1892 and 1896 were fraudulent, and should be set aside; and that the Bank were not purchasers without notice.

Held, varying the judgment of Ross, J., that the mortgage of 17th April, 1884, should stand to the extent of any advances *bona fide* made.

APPEAL by the National Bank (Limited) from so much of the judgment of Ross, J., dated the 29th March, 1906, as set aside certain securities held by the Bank, so far as they purported to convey any interest in the lands of Denis James Henry Coates, deceased, in the pleadings mentioned. The case is reported in the Court below in [1906] 1 I. R. 416, where the pleadings are given and the facts material to the present report are stated in the judgment of Ross, J. The instruments with which the present appeal was conversant were:—

17th April, 1884, mortgage, Coates to Fleetwood Rynd.

22nd September, 1892, conveyance, Coates to Fleetwood Rynd.

21st August, 1896, mortgage, Rynd and Coates to National Bank.

The deed of 22nd September, 1892, recited that the lands thereinafter conveyed were subject to a mortgage for £3000 to Thomas Storey, dated 9th June, 1883; to £781 balance due on foot of a mortgage for £1000 to Eliza Wallis and others, dated 16th April, 1884; and to the said mortgage of 17th April, 1884, to Fleetwood Rynd, which was described as a security for such sums of money, not exceeding £1000, as Rynd should advance to Coates as the land agent and manager of Coates; and to the mortgage to Izod and R. F. Rynd, of 20th March, 1886, for £500; that £1000 was due to Fleetwood Rynd on foot of the mortgage of the 17th April, 1884; and that, in addition thereto, Coates was indebted to Fleetwood Rynd in the sum of £653 8*s.* 4*d.* on foot of accounts stated and settled. The deed then proceeded: "And whereas it has been agreed by and between the parties hereto, that the said Denis James Henry Coates shall grant and convey unto the said Fleetwood Rynd all the estate of the said Denis James Henry Coates in the lands firstly and secondly hereinafter conveyed and described, in consideration of the said

Fleetwood Rynd releasing the said Denis James Henry Coates from all moneys now due, or to become due, for principal or interest on foot of, or secured by, the said indenture of mortgage bearing date the 17th April, 1884, or the covenants contained therein; and also releasing the said Denis James Henry Coates from the said further sum of £653 8*s.* 4*d.*; and upon the said Fleetwood Rynd securing and limiting to the said Denis James Henry Coates an annuity or yearly rentcharge of £200, payable as hereinafter provided, and entering into the covenants, and otherwise upon the terms and in the manner, hereinafter contained and expressed." Then followed the grant of the lands to Rynd, in consideration of the release of said respective sums, and in consideration of the annuity or yearly rentcharge of £200, subject to the mortgages of 9th June, 1883, 16th April, 1884, 17th April, 1884, and 20th March, 1886, to the use that Denis J. H. Coates should during his life receive and take the annuity or yearly rentcharge of £200 to be issuing out of the lands, payable quarterly, and subject thereto, to the use of Fleetwood Rynd, his heirs, and assigns. Fleetwood Rynd released Coates from all sums due on foot of the mortgage of the 17th April, 1884, and from the covenants therein, and from all sums due on the settled accounts. Covenants were entered into by Rynd to pay the annuity, to keep the dwellinghouse of Staplestown in repair, and to permit Coates to occupy same for his life, free from rent, rates, and taxes: "Provided always, and it is hereby agreed and declared, that nothing herein contained shall be deemed to be, or shall operate as, a merger or extinction of the said mortgage of the 17th April, 1884, or as prejudicing in any way the security thereby created as against the hereditaments and premises hereby granted and conveyed."

The mortgage to the Bank, 21st August, 1896, Fleetwood Rynd, called the "mortgagor," of the first part, Coates of the second part, and the Bank of the third part, recited that the mortgagor had been accommodated by the Bank, and was desirous of being further accommodated. It recited the mortgage of 17th April, 1884, and the conveyance of 22nd September, 1892, subject *inter alia* to the said mortgage, and the proviso that it should not merge nor be extinguished, nor be prejudiced as a security

Appeal. 1906.

ALDRITT v. MACONCHY.

against the said hereditaments; that the Bank had required a legal mortgage of the lands, and that Coates had agreed to join for the purpose of postponing his annuity and all or any claim he might have on the lands, hereditaments, and premises or any part thereof. The mortgagor assigned to the Bank the principal sum of £1000, "now due and owing to the mortgagor upon the security of the said mortgage, and the benefit of all securities for the same," to hold subject to redemption. The mortgagor and Coates then demised the lands to the Bank, for 1000 years, from the date of the deed, subject to redemption. The proviso for redemption was on payment to the Bank, by the mortgagor, on demand of all sums due and owing by the mortgagor to the Bank at the time of the demand pursuant to his covenant hereinbefore contained, *i. e.* "the balance which on any account or accounts between the said mortgagor and the said Bank, either alone or jointly with any other person or persons, now is or shall for the time being be due or owing by the said mortgagor to the said Bank, for or on foot of bills of exchange, promissory notes, loans, credits, or advances, interest, commission, discount, or otherwise howsoever, and whether the said mortgagor shall be liable therefor as principal or surety," with interest at 6 per cent., or the current rate at the Dublin office, where exceeding 6 per cent. The operation of section 20 of the Conveyancing Act, 1881, was excluded. And the deed was to be a continuing security to the Bank as well for money due on current securities as for money actually payable.

Extracts from the correspondence leading up to the deeds of 22nd September, 1892, and 21st August, 1896, and from the oral evidence at the trial, are given in the judgment of the Lord Chancellor.

On the evidence as to the mental capacity of Coates, the Court held, agreeing with the conclusion arrived at by Ross, J., that there was no evidence showing that from 1884 to 1897 Coates was an idiot or incapable of executing deeds.

Ronan, K.C., Right Hon. J. H. Campbell, K.C., Herbert Wilson, K.C., and *A. C. Meredith, K.C.*, for the appellants.

Serjeant O'Connor, K.C., Samuels, K.C., and *J. Craig Davidson*, for the respondent.

Appeal. 1906.

ALDRITT v. MACONCHY.

Dec. 17.

THE LORD CHANCELLOR:—

The plaintiff in this action, who is the heiress-at-law and personal representative of Denis James Henry Coates, seeks to have set aside a number of deeds executed by Denis James Henry Coates in his lifetime. They include a disentailing deed dated 6th May, 1869, a deed dated 9th June, 1883, called during the argument the Storey mortgage for £3000, which is now vested in the defendants, Jobson and Montgomery and Chaytor, and a mortgage for £1000, dated 16th April, 1884, vested in the same defendants, called the Wallis mortgage; a deed dated 17th April, 1884, from Coates to Fleetwood Rynd, to secure any advances not exceeding £1000; another deed, dated 20th March, 1886, made by Coates to the defendants William H. Izod and Robert F. Rynd, to secure a sum of £500, called the Izod mortgage; a deed of assignment made by Coates to Fleetwood Rynd, dated the 22nd September, 1892; and a deed, dated 21st August, 1896, made by Coates and Fleetwood Rynd to the National Bank; and, lastly, a deed dated 31st August, 1901, made by Fleetwood Rynd to the defendant, the Earl of Mayo, to secure a sum of £8000 and any further sum found to be due on his agency accounts. Fleetwood Rynd was adjudicated a bankrupt on the 31st October, 1901. The defendants Maconchy and M'Entire are the official assignees, and Lord Cloncurry the creditors' assignee, in that bankruptcy. Neither they nor Fleetwood Rynd defended the action. During the hearing before Mr. Justice Ross the action as regards the setting aside of the disentailing deed of 1869 was not persisted in; that question was immaterial to the plaintiff's title as heiress-at-law. The action also as regards the Storey mortgage and Wallis mortgage was abandoned during the hearing; and the action, so far as it sought to set aside the Izod mortgage, has been dismissed with costs. The dealing with the moneys, however, raised under those three securities as between Fleetwood Rynd and Coates remained and were an important consideration. The deed of 31st August, 1901, to the Earl of Mayo, has been set aside, and there is no appeal against this part of the judgment. This leaves to be

Appeal. 1906. ALDRITT v. MACONCHY. The Lord Chancellor.

considered the mortgage of 17th April, 1884, and assignment of 22nd September, 1892, and the Bank deed of 21st August, 1896. Those three deeds have been wholly set aside as fraudulent and void against Fleetwood Rynd and his assignees, and also against the National Bank. The Bank only has appealed against the judgment; but the appeal involves the consideration of the relations and dealing in respect of those three deeds between Coates and Fleetwood Rynd on 17th April, 1884, 22nd September, 1892, and 21st August, 1896, and also on the occasion of an equitable deposit of the deed of 17th April, 1884, made by Rynd to the Bank in November, 1884, and a like deposit on the 11th May, 1893, of the deed of 22nd September, 1892. The case made by the statement of claim is of a two-fold character: 1. That Denis J. H. Coates was from his birth an idiot, and incapable in law of executing any of the impeached deeds; and 2, that Fleetwood Rynd was the land agent of Coates from the time he came into possession of his property, and that Coates was a person of feeble intellect and wholly under the control of Rynd; that Rynd applied the rents to his own purposes, and never stated and settled accounts with Coates, who took moneys from Rynd for his personal wants as he received them, and executed all documents as asked; that no moneys were due by Coates to Rynd when the impeached deeds now in question were executed; and that the National Bank, who were the bankers of Rynd, and his creditors as such in 1892 for about £5000, and in 1896 for over £9000, could not assert any higher title against Coates than Rynd had, and were from the circumstances and the frame of the securities they took charged with notice actual and constructive of the infirmity of Rynd's title as against his principal.

So far as regards the first of the grounds on which the statement of claim is rested, I am of opinion that there is no evidence referable to the periods to which the deeds now in question relate, viz., 1884–1897, that Denis James Henry Coates was an idiot, or incapable in law of executing deeds. It is true that three of our most eminent doctors have given evidence that in November, 1901, and in 1902, Coates was suffering from dementia, and an imbecile, and incapable of doing any act of business; but I think this would be a much exaggerated estimate of him from 1883 to

1897. It may be that Major Rynd gives the true account when he says that his mental condition had changed much for the worse in the latter years; and I shall now shortly state my estimate of Coates as from his boyhood to 1896, without going into details of the evidence of the various witnesses examined, except as such details are referable to the deeds themselves when I come to deal with those deeds chronologically.

Coates was born on the 25th August, 1840, and he died on the 31st January, 1903. He lived at Kingstown with his father till 1870, when he moved with his father to Staplestown. He was an only son. His father died in 1880, and he lived on at Staplestown to his death. He had been a day boy at Stackpoole's School at Kingstown for a period at least as long as boys are usually kept. School-boys' estimates of their school-fellows are usually correct, and I think that as he was, as a boy at school, the class dunce, so, in matter of education, he was, as a man, slow of comprehension, slow in speech. He had sufficient brain-power to raise him above imbecility, but he had no business habits. He did not attend either fair or market. He paid no visits, and had no intimates and few acquaintances. His principal place of resort was the publichouse at his gate. He had few wants, chiefly for food, and more or less for whiskey. He could do small acts of business when he exerted himself, but as a whole he was glad to leave to others the management of his affairs—in his house to his servant, and of his property to his agent. Fleetwood Rynd had been his father's agent, and continued to be his; Rynd had absolute control, and Coates entirely depended upon him, and he never questioned any act of Rynd's or account furnished to him, or failed to execute any deed or document or bill submitted by Rynd for his signature. The one protest against £100 per annum being enough for him to live on, which his personal wants suggested to him by experience, is a striking instance of how far only would he go, when we come to consider minutely the transaction of 1892.

It is well to state what the property was which Coates came into possession of in 1880, and which was then practically unincumbered. It appears from the valuation made on 20th April, 1883, for the purpose of the Storey mortgage, that it consisted of

Appeal. 1906. ALDRITT v. MACONCHY. The Lord Chancellor.

271A. 1R. 34P. of Corkereagh and Staplestown in the owner's hands, the estimated letting value of which then was £566 17*s.* 1*d.*, and other portions of same denominations let to tenants, producing a rental of £341 19*s.* 5*d.*; the tithe-rent and drainage charges were £278 17*s.* 2*d.*, leaving an estimated profit rent of £629 19*s.* 4*d.* On the 22nd February, 1888, during the progress of the negotiations which eventuated in the deed of 22nd September, 1892, Mr. Rooke wrote that the net rental then was £610 4*s.* 7*d.* This valuation was carried on and acted on in subsequent transactions, and is produced by the Bank as one of their securities. The letting value of the lands in hand is a debatable and disputed matter, but Fleetwood Rynd on 6th December, 1885, when the Izod mortgage was being negotiated for, wrote to Mr. Maunsell: "All the best of the lands are in the occupation of the owner, and I consider the estate value for from £15,000 to £16,000; even in these bad times some of the land in the owner's hands is worth £4 per acre."

I think the most convenient course is to pass by in the first instance, as was done by Serjeant O'Connor in his able argument, the deed of 17th April, 1884, and deal with the deed of 22nd September, 1892, which was deposited with the appellants on 11th May, 1893, to secure the indebtedness of Rynd. That deed has been set aside by the judgment appealed against, as against both the National Bank and Rynd. It is necessary to consider that deed (1) as between Coates and Rynd, and (2) as between Coates and the Bank. The idea of Rynd to get a security from Coates appears, according to the correspondence, to have originated on the 11th June, 1887, when he wrote to Rooke, Coates' solicitor, stating that Coates owed him on the agency accounts to 31st May, 1886, £653 8*s.* 4*d.*, and sending two promissory notes of Coates dated 25th January, 1887, one for £1400, and the other for £653 8*s.* 4*d.*, payable 28th July, 1887, and he writes that, in consideration of this sum, "Mr. Coates wishes to give me over an assignment of his estates in Kildare, and in reversion to me after his decease. Will you kindly prepare the necessary deed?"

The form this deed was to take was afterwards agreed to be a mortgage for the sum due, with a policy on Coates' life. Fleetwood Rynd was to be appointed irrevocably receiver and manager

of the estate, and pay Coates an annual sum of £120. Rynd at first suggested £100, but Coates told Rooke he could not live on that, and Rynd agreed to make it £10 a month. There were two attempts made to insure Coates' life, but the companies declined the risk. A draft deed was prepared; and it appears that on the 29th February, 1888, Coates saw Rooke, and Rooke on that day wrote to Rynd: "Mr. Coates called here to-day at my request to read over the draft deed, but on speaking to him I find that he is not satisfied that the accounts are all right, that is to say"—(a remark of Mr. Rooke's in which I agree)—"he does not know whether they are or not, and that he would wish to have them examined by someone on his behalf. I have no doubt that the accounts are as stated; but of course Mr. Coates should be satisfied, and as he does not seem to be familiar with the accounts, they should be examined by a third party on his behalf." It appears that Coates had signed the accounts each year as correct, just as they were presented to him. Mr. Rooke employed Mr. Swayne, an official of the Bank of Ireland, to audit them; but though he went some way into them, he was unable to obtain vouchers for certain large sums which he required, and they remained unaudited, though it appears they were adopted unaudited as a basis of the deed executed. At the same time, I cannot find that the figures in the deed correspond with those in the accounts.

On the 25th June, 1892, a new mode of dealing with Coates seems to have occurred to Fleetwood Rynd, for he wrote on that day to Rooke: "Mr. Denis Coates called upon me to-day, and I have arranged with him that in future he is to have £200 a year out of the estate, to be paid quarterly, and he is to make over the estate to me; this is his own suggestion; and, should this proposal be carried out, I am to relieve him of the amount due to me on foot of the agency account which has accrued during the past ten years"; and Mr. Coates wrote on the 27th June: "Will you kindly prepare a deed, giving me £200 a year"; and Coates wrote again, on the 7th July, to Rooke: "I shall not be in Dublin for some time, but you can prepare the deed of reversion to Mr. Rynd, and send it to me for approval. I am to have £200 a year for my life, in lieu of assignment, and

Appeal. 1906.

ALDRITT v. MACONCHY.

The Lord Chancellor.

Mr. Rynd is to forgive any money that may be due to him on foot of my estate." On the 16th July, 1892, Rynd wrote to Mr. Rooke: "Kindly let me have a copy of the security deed to the National Bank for £1000 that was borrowed by Mr. Coates on a joint promissory note, but has since been paid off." Mr. Rooke, accordingly, sent him a copy of the mortgage of the 17th April, 1884. That letter of Rynd's is in strange contrast with the first recital in the deed of 22nd September, 1892, which states £1000 to be due on it. Rynd represented to Rooke that Mr. Swayne had certified for a balance on the accounts equal to the two notes of 25th January, 1887, which was untrue; Mr. Rooke repeatedly pressed for the accounts audited, as showing that whatever was in the bills was the amount due.

Mr. Rynd met this in two ways—(1) by getting Coates to write to Rooke on 5th August, 1892: "I am to have the use of the house rent free, and Mr. Rynd keep it in repair; the amount of the bills which I gave Mr. Rynd is what I acknowledge to be due to him"; and Rynd wrote to Rooke on 13th August, 1892: "The last account audited by Mr. Swayne was in 1888, and as Mr. Mowatt, my late clerk, who had charge of the vouchers, mislaid the small bundle of them containing some tithe rentcharge and drainage receipts, Mr. Swayne did not complete the vouching, but it was only a very trifling matter, and of course I can get duplicates." This is an entire misrepresentation so far as regards Mr. Swayne. Mr. Rooke ultimately agreed to send down the deed to Coates for execution, without waiting for what Rynd represented to be a formal closing of the audit, and also on the representation that Wallis was pressing for a balance of £781 10*s.* due on the mortgage of the 16th April, 1884, which Rynd arranged to take over and pay off. Accordingly Mr. Rooke sent down his assistant, Mr. Meredith, on the 20th September, who saw Mr. Coates, and the result is stated by Rooke, to Rynd, in the letter of 23rd September, 1892: "We saw Mr. Coates yesterday at Staplestown. Our interview with him was perfectly satisfactory. He thoroughly understood and approved of the provisions of the deed." The deed was executed, and Rynd paid the costs of

Rooke, as reduced on a pretended assertion that Coates wanted them taxed. Before I deal with the contents of the deed itself, which as regards the appellants is by far the most important question, let us consider how the matters stood between Rynd and Coates. Having regard to the net rental stated by Rooke himself, and the value of the property as stated by Rynd on 31st December, 1885, the handing over of the estate to Rynd, in consideration of an annuity of £200 per annum to Coates for his life, even with the house rent free, seems a grossly improvident transaction. In any view it seems to me there would have been a surplus, whether we take it as income or capitalized value.

Mr. Swayne has been examined, and he tells us he did not complete the audit because he could not get the materials he required, though he wrote to Rynd for them; and he is positive he never saw Coates in reference to the audit. It appears by Rooke's entry on the 26th January, 1892, that Rynd told Rooke that Mr. Coates had seen Mr. Swaine, who had satisfied him as to the correctness of the amount; therefore we have a material misrepresentation which would influence Rooke, and which did also influence Meredith in his interview with Coates on 22nd September, 1892.

Now on that day, the 22nd September, 1892, Coates' name was on a bill to the Bank for £400 still due, and also on one for £600, given 1st September, 1892, which became to the extent of a balance of it of £500 amalgamated with one for £800 due 24th January, 1893, thus becoming £1200. When Mr. Meredith went down and saw Coates on 22nd September, having the deed engrossed with him, he was in a frame of mind which induced him to believe everything Rynd had represented, including that the accounts had been partially audited. There are numerous substantial items on which it is alleged by the plaintiff there are improper charges against Coates. We have no materials for accurately arriving at a conclusion about them. There are some, however, which startle—an item of £75 for commission on Storey's mortgage, one of £784 12*s.* 6*d.* portion of the proceeds of Wallis's mortgage of 1884, which was not credited to Coates till the last account (1891), and which appeared in the accounts submitted to Mr. Swayne as a liability

Appeal. 1906.

ALDRITT v. MACONCHY.

The Lord Chancellor.

of Coates, and Coates all along signed the accounts as correct; and it also appears that an item of £500 received on Izod's mortgage by Rynd was never credited. This is referred to in an entry of Mr. Rooke on 11th November, 1889: "Attending Mr. Swayne. It appears that the £500 raised by mortgage from the trustees of Mr. Rynd's settlement had been altogether omitted." Mr. Meredith says he asked Rynd about that, and Rynd said "it was applied in the payment of some charge or other, and that Mr. Coates was only debited with the balance"; and this satisfied Meredith. In fact, he, like most others at that time, believed Rynd to be a solvent and honest man. It startles one, when we are considering these transactions between Rynd and Coates, to hear that from June, 1883, to 17th April, 1884, he should be alleged by Rynd to require for the purchase of stock three sums equal in round numbers to £2,575.

Now let us take up this deed of 22nd September, 1892. It recites the Storey mortgage for £3,000 and Wallis mortgage of 16th April, 1884, on which £781 10*s.* is stated to be due, and the mortgage of 17th April, 1884, which is treated as subsisting on the lands. [His Lordship read the recitals, *ante*, pp. 334, 335.]

It does not state that the mortgage of 17th April, 1884, had been deposited by Rynd with the Bank in 1884 as a security for the £1000 bill then represented by £400 only. [His Lordship read the release and proviso, *ante*, p. 335.]

The enforcement of one penny under that against Coates or the estate would be a fraud on Coates, and inconsistent with the release agreed to be given. The only explanation which Mr. Meredith gives of this in his evidence in effect is that Rynd's covenant was then what he seems to think would be security enough. He admits he understood (5734) "all liability on bills and deeds and everything of the kind was to be wiped away." (5745) Asked: "So that for all you know after the execution of the deed of 1892, he might still be liable for outstanding bills?" Answer: "I never had any idea there were any other bills, and no one at that time mistrusted Mr. Rynd." At (5746) "Coates understood he was to get the £200 free from all liability." (5762) "Were you aware at the time that this deed was being executed, that the

£1000 mortgage to Rynd had been pledged to the National Bank?" "I was aware that it had been deposited with the National Bank in 1886" (this should be 1884), "I think on the occasion of the £1000 bill to secure it, but I believed that the £1000 had been paid off. Rynd had so written."

It appears to me that anyone reading this deed of 22nd September, 1892, must see it was illusory as regards Coates, and did not carry out the fundamental agreement on which it was based, and it was for that reason I read Rynd's letter of 25th June, 1892: "I am to relieve him of the amount due to me on foot of the agency account which has accrued during the past ten years."

It is not surprising that Mr. Ronan should admit and emphasize that this deed could not stand between the parties which bartered away this property for £200 per annum for life, to supply Coates' animal wants. On the 11th May, 1893, this deed was deposited by Rynd with the Bank to secure his indebtedness, which had then reached £5000; and at that date Coates was liable to the Bank on the bills, still held after the deed of 1892, and renewed after it, for the £400 and £600.

What did the appellants know? They knew of the relation of principal and agent. They knew the value of the property, for they held Johnson's valuation. They knew by reading the deed of 22nd September, 1892, that it defeated the object for which it had been given, to the advantage of themselves, the creditors of Rynd, who was fast financially failing. It is not a case of constructive notice, but actual notice conveyed by the deed itself. If they had gone to Meredith (assuming such a question arises), we cannot assume he would not have told them what he has stated in his evidence.

I am satisfied that the appellants have, as regards this deed of 1892, no higher title than Rynd, who deposited it. In my view of this case I think we are entirely relieved from considering either the effect or construction of sect. 3 of the Conveyancing Act, 1882. We have a reading on that in *Oliver* v. *Hinton* (1), which is quite satisfactory to my mind.

I have not thought it necessary to go into the rental and cash

(1) [1899] 2 Ch. 264.

Appeal. 1906.

ALDRITT v. MACONCHY.

The Lord Chancellor.

accounts between Rynd and Coates, from 1880. They are only material as between the parties. They began first in debit, by wrongly charging against Coates a sum of £784 12*s.* 6*d.*, price of cattle, which was carried on for six years, and not corrected till 1891, when there is brought in a credit for that amount, but Coates signed them all as presented to him.

This brings us to the last transaction of 21st of August, 1896.

At that date Coates' name was on bills to the Bank with Rynd for £2500, £400, £500, £800, and £800, of which £1600 was on bills given after the deed of 1892, and after Coates had parted with his estate. Rynd then owed the Bank over £9000. It is pretty obvious that one of those £800 bills is the document referred to in Rynd's letter of 15th January, 1896, to Coates, "Please sign the enclosed in pencil."

Mr. Coates' annuity of £200 was of course, so far as the deed was concerned, prior to any claim of the Bank under the deposit of the 11th May, 1893. Mr. Maunsell was the manager at the College Green Office, and he was alarmed at the state of Rynd's account, and pressed for further security, and suggested to Rynd that Mr. Coates should postpone his annuity to the Bank's claims, and Rynd applied to Coates to do it ; in other words, to give up this last remnant of his property which stood between him and starvation. Coates wrote to the manager on 9th May, 1896 : "Mr. Fleetwood Rynd informs me that you require first charge on my annuity of £200 a year, which I am willing to give ; and if you will send down the document to me for signature, I will sign it in the presence of my parish clergyman, as my present state of health will not permit of my leaving home just now."

There is another letter from Coates of 11th June : "I have seen Mr. Rynd, who tells me that you wish me to confirm in writing that I have signed a joint promissory note for £800, due 10th inst., which I have pleasure in doing." It is only useful in showing that Coates was as clay in the hands of the potter, so far as Rynd was concerned. Perhaps the manager wanted assurance as regards the signature.

Coates was on bills to the amount of £2500, but Rynd owed the Bank £9228 on bills and otherwise. Mr. Maunsell fairly tells us that the understanding was, that Coates was to give security

and postpone his annuity only so far as regards the £2500 he was liable for on bills.

That being the understanding, the manager writes to Coates on 20th June: "I now beg to send for favour of perusal and return with approval endorsed, draft mortgage, Mr. F. Rynd and yourself to the Bank. Sign it; then give it to Mr. Rynd for approval and signature."

The reply, 24th June, is characteristic of the man: "I have shown the draft mortgage to Mr. F. Rynd, who has approved of it, and I now return it to you signed by me." That Rynd should approve of the draft as sent was natural, but his intervention was not protection, but the destruction of the interests of his principal, Coates. The mortgage itself was sent down on 14th July, and, after some pressure to return it, was signed in the country by Coates on 21st August.

There is no suggestion of the intervention of any solicitor for Coates. His adviser was Rynd, his agent, and Rynd's creditors were pressing. The deed as sent and signed, and now insisted on by the appellants, is a deed postponing Mr. Coates' annuity to every farthing of the £9228 due by Rynd to the Bank.

It is probable that even as a postponement for the £2500 it would strip Coates of everything; but that is not the question, but whether the appellants can rely as against Coates on the deed signed going to the extent of £6728, the difference between £9228 and £2500, beyond the understanding of the parties as proved by Maunsell.

We have not to consider whether Coates or his assets are liable for and on the several bills making up £2500. It is probable an answer is furnished by the considerations which affect the deeds; but we have only to determine on the validity of the deeds, and bringing in all these elements of notice against the Bank, to which I referred in dealing with the deed of 1892, I am satisfied that the Bank cannot rely on this deed of 21st August, 1896, and that it was rightly set aside by Mr. Justice Ross. I am not to be considered as suggesting that there was any fraud on the part of the Bank in any invidious sense of that term. Mr. Maunsell has given his evidence most fairly,

Appeal. 1906.

ALDRITT v. MACONCHY.

The Lord Chancellor.

and I can quite understand the capable assistant of Mr. Dunne drawing the deed in its wide form for the protection of the Bank. It was well known then that Rynd was financially in a very bad condition, and the draftsman's attention was directed to the Bank's protection; but in this case, as in the case of the deed of 22nd September, 1892, I think the deed falls from its own infirmity, arising from admitted facts. As regards the deed of 17th April, 1884, it has been set aside by the judgment appealed against. It appears to have been deposited by Rynd with the appellants as security; but this deed is only a security for advances made by Rynd, and sums found due to him not exceeding £1000. If anything should appear to be due to Rynd by Coates, the Bank will *pro tanto* be entitled to rely on it. This is not disputed by the plaintiff, and the Bank do not claim any higher rights under it. We shall alter the judgment by omitting from it the declaration setting aside this deed of 17th April, 1884, and dismissing the action as regards that mortgage without prejudice to any claim that may be proved to really exist under it. The deed was not relied on by the Bank in their defence.

With that slight alteration which is not sufficient to affect the costs, we shall affirm the judgment of Mr. Justice Ross, and dismiss the appeal with costs.

FITZGIBBON, L.J.:—

The order of Mr. Justice Ross directs that the three deeds under which the Bank claims, dated 17th April, 1884, 22nd September, 1892, and 21st August, 1896, shall be set aside as against the plaintiff; the order as to the deed of the 31st August, 1901, to the Earl of Mayo, is not before us. We propose to discharge this order in so far as it relates to the deed of 1884, thereby confining the avoidance to the deeds of 1892 and 1896. We dismiss the second paragraph of the statement of claim, and, subject to these variations, we affirm the decree.

It would be unwarrantable to attempt to repeat the life history of Denis J. H. Coates, and of the various dealings with him; and I agree in all respects with the judgment of the Lord

Chancellor. It is plain that the Bank took the best security that it could get; but these deeds on their very face could not be held valid to create the incumbrances here claimed, having regard to the knowledge which the Bank had of the relations existing between Coates and Rynd, and more especially of the pecuniary relations existing at the time between the Bank, Rynd, and Coates.

The claim to set the deed of 1884 aside was based by the pleader on the absolute incapacity of Coates, and that ground of impeachment is not supported by the evidence. The deed itself, from its character, could not produce any injurious effect, even if it had been procured with the intention of ultimately reaching some fraudulent object by means of it: it is only a security for whatever may be found due by Coates to Rynd up to the sum of £1000. In striking this deed out of the judgment we leave it to stand only for what may be found due, and we do not prejudge or anticipate any question of account, whether there was anything, and if so, how much, due from Coates to Rynd. Whether Coates was defrauded in being charged, under the deed, with debts he did not owe, cannot be decided at this stage, and the state of the account is not before us.

HOLMES, L.J., concurred.

Solicitor for the appellants: *W. H. Dunne.*
Solicitor for the respondent: *Norris Goddard.*

R. ST. J. C.

Barton, J.
1908.
Feb. 13–15,
27.

LUCY *v.* SEXTON.

(1907. No. 773.)

Specific performance—Sale of licensed premises—Condition of sale—License stated to be "the property" of mortgagees—License retained by mortgagees—Purchaser's requisition to indorse certified copy of license—Sale free from incumbrance—Form of conveyance.

Upon the sale of premises, which included a publichouse, one of the conditions of sale was as follows:—"The vendor shall do all acts necessary and competent to her to enable the purchaser to obtain a transfer to him of the retail license, which is the property of Messrs. B. & C., Ltd., attached to the premises; but the failure to secure the said transfer (unless caused by wilful default of the vendor) shall not annul the sale, nor shall any reduction be made in the amount of the purchase-money by reason thereof." B. & C. were mortgagees, and the vendor was unable to produce the original license, which was in their hands. The mortgage contained a recital that the license was the property of B. & C., and a trading agreement. The premises were being sold free from incumbrances, and the mortgage was to be discharged out of the purchase-money. B. & C. had retained the license, and proposed to require the purchaser to enter into a trading agreement. The purchaser required the vendor to indorse a copy certified in accordance with sect. 36 of the Licensing (Ireland) Act, 1874, which the vendor declined to do. The vendor insisted on having words inserted in the conveyance to the effect that the premises were being sold subject to B. & C.'s ownership of the license, to which the purchaser objected:—

Held, that the vendor could not reasonably refuse to indorse a certified copy of the license in respect of her interest therein; that she was not entitled to require the insertion of any such words as had been insisted on; and that, therefore, the purchaser was entitled to specific performance, which was the relief claimed.

ACTION.

The plaintiff, Mrs. Mary Lucy, in her statement of claim, averred that by an agreement dated the 18th May, 1907, the defendant agreed to sell to the plaintiff the licensed premises known as No. 1, Albert Quay, and the three adjoining houses known as Nos. 2, 3, and 4, Albert Street, situate in the parish of

Saint Nicholas and City of Cork, held under lease bearing date the 22nd May, 1874, from the Cork, Blackrock, and Passage Railway Co. to Daniel Sexton for the term of 9,000 years, from the 25th March, 1874, at the yearly rent of £68 10*s.*, adjusted to £59 15*s.*, at the price of £3200, together with auction fees amounting to £80; that the plaintiff paid to defendant a deposit on the said purchase-money amounting to £800, and also paid the said auctioneer's fees. The sale was to have been completed on the 3rd June, 1907; that by the said agreement the defendant had agreed to do all acts necessary and competent to her to enable the plaintiff to obtain a transfer to her of the retail license attached to the said premises, 1, Albert Quay, Cork; that the defendant had refused to perform the said agreement, or to execute a proper assignment of the premises, or to enable the plaintiff to obtain a transfer of the license attached to the said premises.

The defendant, Bridget Sexton, in her defence, averred that, at the date of and prior to the agreement, the retail license attached to the premises, which were the subject of the said agreement, belonged to and was the property of the firm of Messrs. Beamish & Crawford, Limited, who carried on the business of brewers in the City of Cork; that the said firm had lent their said license to the defendant for the purpose of enabling her to carry on the trade of licensed publican on the said premises, and that at the date of the said agreement the defendant held the said license as bailee and trustee for the said firm.

(2) That the plaintiff purchased the said premises with full knowledge and notice of all the matters mentioned in the preceding paragraph, and that the title to and ownership of the said license were fully set out in the 13th condition of sale, subject to which the sale of the said premises was made to the plaintiff.

(3) The defendant denied that she refused to perform the said agreement or to execute a proper assignment of the said premises, as alleged in the statement of claim, or that she refused to enable the plaintiff to obtain a transfer of the said license, but alleged that she was at all times willing, and thereby offered to convey to the plaintiff the said premises and all her interest (if any) in the said license subject to the rights therein of the said firm of Beamish & Crawford, Ltd.

Barton, J. 1908.

LUCY v. SEXTON.

In her reply the plaintiff submitted that the defendant was at all material times the licensed person to whom the license was by the proper licensing authority granted in respect of the premises, and that Beamish & Crawford were not at any time material the persons licensed in respect of the said premises; that Beamish & Crawford were entitled to a mortgage upon the premises, and until the said mortgage was paid off, were entitled to certain rights to exclusive trading upon same; that the said mortgage would be discharged out of the purchase-money, which was ample, and that beyond the said mortgage Messrs. Beamish & Crawford had no right, title, or interest in the said premises, and that the defendant had contracted to sell the premises free from incumbrances.

The plaintiff claimed specific performance of the above agreement, and that the defendant should execute a proper conveyance of the said premises to the plaintiff, and should indorse the said retail license or a certified copy thereof with a transfer to the plaintiff of defendant's interest therein.

Condition 13 referred to in the pleadings was as follows: "The vendor shall do all acts necessary and competent to her to enable the purchaser to obtain a transfer to him of the retail license, which is the property of Messrs. Beamish & Crawford, Ltd., attached to the premises; but the failure to secure the said transfer (unless caused by wilful default of the vendor) shall not annul the sale, nor shall any reduction be made in the purchase-money by reason thereof."

The particulars described the premises as follows:—

"Exceptional investment; splendid licensed premises, having a remarkably fine trade connexion, and situate in one of the best business positions in Cork, known as Sexton's, Albert Quay, for sale by auction.

W. MARSH & SONS

are favoured with instructions from the owner to sell by auction at the property salerooms, No. 70 South Mall, Cork, on Saturday, 18th May, 1907, at the hour of 12 o'clock, the above well-known and lucrative business concern, which is held under long lease at a nominal rent.

"These fine premises, which were built and furnished in a most superior manner, are situate in one of the best business

centres in Cork, being at the corner of Albert Street and Quay. They command almost the entire trade of the immediate neighbourhood, and the shipping at this point being practically never-ceasing, a continuous trade is always on, with the result that an extraordinary turnover is done in draught porter alone on the premises. Other sources also add considerably to the business; for instance, the house commands the chief thoroughfare to Cork Park races, the sports grounds, Cork City Regatta, Cork and Bandon, and Cork and Crosshaven Railways; and with such natural advantages, trade connexion, and the unrivalled situation, it cannot fail to be looked upon as unique and unequalled by any other premises in the city.

"The property comprises spacious public bar (with entrance on the Quay), suitably adapted to the carrying on of an extensive trade. There is a private saloon bar, entered from Albert Street, admirably arranged, and in which a high-class business has always been done. There is also a good bottling store and yard. The dwelling-house overhead has excellent accommodation, and is in first-class order. The entire forms one of the most attractive and exceptionally rare business investments put to auction in the south of Ireland during recent years."

It appeared that on the 26th June, 1891, the defendant had executed to Beamish & Crawford, Limited, the mortgage referred to above, for a sum of £600, which recited that the defendant carried on the business of a publican in the said premises, and that the license under which she so carried on said business was the absolute property of the Company, but had been lent to the defendant, as she did thereby admit and declare; and it was witnessed by the said mortgage that for the considerations therein the defendant covenanted with the said Company to repay the principal and interest as therein; and it was also witnessed that for the considerations aforesaid the defendant, as beneficial owner, demised by way of mortgage unto the Company the premises demised by the said lease. The mortgage, among others, contained a covenant by the defendant that so long as any money remained owing the defendant would deal solely and exclusively with the Company for all porter, stout, and ale, which should be sold or consumed on the premises to which the said

Barton, J. 1908.

LUCY v. SEXTON.

license was attached, or any renewal thereof, and that she, the defendant, would, when called upon, execute to the Company, or to any person nominated by the Company, a valid transfer of the said license, or any renewal thereof, and would in the meantime indorse all renewals to be obtained of the said license, and lodge same with the Company, their successors or assigns, and do all matters and things, and sign notices of transfer, and all documents necessary for effectually transferring the said license, or any renewal thereof, from the name of the defendant into the name of such person as they nominated and appointed.

Just before the issue of the writ in the action the solicitors for the defendant wrote the following letter to the plaintiff's solicitor :—" We duly received yours of 8th instant, and cannot advise Mrs. Sexton to execute a conveyance in the form sent by you, as it is an assignment of the premises, as licensed premises, without such qualification as to the property in the license as is contained in the conditions of sale. We have altered the draft, and return it to you herewith. We cannot agree to your proposal that the vendor should indorse on a certified copy of the license a transfer. You are aware that the property was sold subject to the rights of Beamish & Crawford as regards the license, and that the license is in their possession. We cannot advise Mrs. Sexton to make a transfer, the effect of which would be that Mrs. Sexton would deprive Beamish & Crawford of the benefit of their possession of the certificate, which she has no power to do."

A considerable correspondence passed between the respective parties while the action was pending, towards the end of which the plaintiff's solicitor in a letter dated 11th November, 1907, made the following offer: " The plaintiff is willing, and hereby agrees, to take the conveyance in the form claimed by plaintiff with all its infirmities if any exist, and will undertake, and hereby does undertake, not to seek to in any way make the defendant responsible for the consequences." This offer was not accepted by the defendant.

D. B. Sullivan, K.C., and *A. M. Sullivan*, for the plaintiff.

Ronan, K.C., *Conner, K.C.*, and *Norwood*, for the defendant.

Barton, J. 1908.

Lucy v. Sexton.

The question argued, the cases cited, and the evidence relied on, so far as material, are sufficiently referred to in the judgment of Barton, J.

Barton, J.:—

Feb. 27.

This is an action for specific performance of an agreement for the sale of certain leasehold premises in Cork, which include a licensed publichouse. The particulars and advertisements of the sale were principally taken up with the trade connexion, convenient situation, and admirable arrangements of the public-house, which was represented as the chief attraction of the sale. Two questions have arisen out of the 13th condition of sale, which ran as follows:—"The vendor shall do all acts necessary and competent to her to enable the purchaser to obtain a transfer to him of the retail license, which is the property of Messrs. Beamish & Crawford, Limited, attached to the premises; but the failure to secure the said transfer (unless caused by wilful default of the vendor) shall not annul the sale, nor shall any reduction be made in the amount of the purchase-money by reason thereof." Mr. Healy, the purchaser's solicitor, was struck by the reference to the license as "the property of Beamish & Crawford, Limited." He made inquiries from which it appeared that the house was not a tied house, but that Messrs. Beamish & Crawford, Limited, the well-known Cork brewers, were mortgagees of the premises, and that there was a recital in the mortgage to the effect that the license was the property of Messrs. Beamish & Crawford. He also learnt that the mortgage contained a trading agreement, and that Messrs. Beamish & Crawford retained possession of the license. The premises were being sold free from incumbrances, and the mortgage was to be paid off out of the purchase-money. Nevertheless, it was stated at the auction that Messrs. Beamish & Crawford would expect the purchaser to enter into a trading agreement with them. These claims of Messrs. Beamish & Crawford seemed to Mr. Healy to offend two principles of law; first, the rule illustrated in *Noakes &*

Barton, J. 1908. LUCY v. SEXTON.

Co. v. *Rice* (1), that a publican's covenant in a mortgage to a brewer to deal exclusively with the brewer does not continue after payment off of the loan and the redemption of the mortgage, being thenceforward a clog upon the equity of redemption and as such void; and secondly, the principle recognized in *Kelly* v. *Montague* (2), that there is no property in a publican's license apart from the ownership of the premises to which the license is attached. In *The Queen* v. *Justices of Cork* (3) Holmes, J., said (at p. 113)—"It is, I believe, now firmly settled as a cardinal principle of the licensing law that the holder of a license must have such an estate or interest in the licensed premises as entitles him to occupy them."

This brings me to the first question for decision—was the purchaser entitled to require the vendor to indorse to her a certified copy of the license in respect of all her (the vendor's) interest therein? In other words, was it, within the meaning of the 13th condition of sale, "necessary" and "competent" for the vendor to do so for the purpose of enabling the purchaser to obtain a transfer from the Justices? In my opinion these questions should be answered in the affirmative. Section 36 of the Licensing (Ireland) Act, 1874, makes a certified copy conclusive evidence of the license for every purpose. The Vice-Chancellor, in the fourth of his four well-known propositions in *Brennan* v. *Dorney* (4) (approved of by Ashbourne, C., in *Kelly* v. *Montague* (2) and binding on me), laid it down that the statutory requirements of indorsement by the Justices can be complied with by indorsement on a certified copy of the license. Why, then, should not the vendor indorse a certified copy for production by the purchaser to the Justices? The indorsement of the license by the vendor to the purchaser, although not prescribed by statute, has become, both in England and Ireland, an ordinary incident of the transfer of licensed premises. Romer, J., in *Tadcaster Tower Brewery Co.* v. *Wilson* (5) at (p. 710), spoke of the vendor of a publichouse as being "bound" to have "a valid and effectual license which he can indorse in the usual way." In the present

(1) [1902] A. C. 24.
(2) 29 L. R. Ir. 429, 436, 437.
(3) [1895] 2 I. R. 104.
(4) 21 L. R. Ir. 353, 361.
(5) [1897] 1 Ch. 705, 710.

case the vendor cannot indorse the original license, because it is retained by Beamish & Crawford. But why should she not indorse a certified copy? It is "competent" for her to do so, having regard to the law enabling a certified copy to be availed of in lieu of the original. It is reasonably "necessary" for her to do so, for the purpose of enabling the purchaser to obtain a transfer, having regard to the practice in such cases. She is only asked to indorse the license in respect of her own interest. I see no reason why the vendor should not have consented to the purchaser's requisition, to indorse the copy of the license in respect of her (the vendor's) interest therein.

There remains the question as to the form of the conveyance. For the purpose of deciding that question it is necessary to ascertain what it was that the defendant insisted upon having inserted in the conveyance. I pass by the earlier stages of the correspondence, and I come to the crucial date of 11th July, when the conveyance was returned by the vendor, with the result that the writ in this action was issued on the following day. The vendor proposed to insert in, or to add to, the *habendum* the following words:—"And subject as regards the license held by the said Bridget Sexton in respect of said premises No. 1, Albert Quay, to all such title and right of possession as Beamish & Crawford, Ltd., have in and to the same as *owners of said license*." That would make the conveyance subject to Messrs. Beamish & Crawford's alleged ownership of the license, as if it was some admitted paramount right, subject to which the premises had been agreed to be sold and conveyed. The insertion of similar words has been insisted on ever since, *e.g.*, in the letter of July 25th, and in the statement of defence. The claim to insert words of this kind is, in my opinion, unsustainable. I do not think it would ever have been made if the vendor had not practically placed herself in the hands of Messrs. Beamish & Crawford in forgetfulness of her obligations to plaintiff under this contract of sale. If it is desired to sell and convey property subject to a paramount claim, or to a prior charge or other incumbrance, it should be stated in the particulars, or stipulated for in the conditions of sale. This explanatory parenthesis in condition 13 cannot be converted into a condition to the effect that the property is to be

Barton, J. 1908. LUCY v. SEXTON.

sold and conveyed subject to Beamish & Crawford's alleged right as owners of the license.

The case might have presented a different aspect if the defendant had merely insisted upon the insertion of a proviso that the covenant for title implied by reason of her conveyance as "beneficial owner" should not extend so as to render her liable in respect of any claim of Beamish & Crawford in respect of the license. But no such point was made until it was suggested in argument. On the contrary, when Mr. Healy, in one of the last letters in the correspondence, offered an undertaking not to make the vendor responsible for any infirmity in the title to the license, the offer was rejected as irrelevant to the points at issue. Any question of that kind can be discussed at Chambers, if the parties cannot agree.

The plaintiff is, in my opinion, entitled to the relief which she claims, and the costs must follow the result.

Solicitor for the plaintiff: *M. Healy.*
Solicitors for the defendant: *Foot & Son.*

J. MAC M.

Ross, J. 1908. Jan. 17, 20, 21, 24, 27, 28, 29, 30. Feb. 28.

O'NEILL *v.* JOHNSTON.

(1907. No. 149.)

Several fishery—Navigable non-tidal lake—Public user—Prescription—Evidence—Injunction—Practice.

The Crown is not, of common right, entitled to the soil or waters of an inland non-tidal lake.

No right can exist in the public to fish in the waters of such a lake.

A claim was made for a several eel fishery, extending over the whole of Lough Neagh, a large, navigable, non-tidal lake in Ireland. The claim was founded on a grant by Charles 2, dated 1661, and upon certain leases since made by persons claiming under the grant, and payments of rent under grant and leases were shown. The title of the Crown was established to the satisfaction of the Court by certain inquisitions had prior to the grant. As evidence of user under the grant it was proved that the Bann eel fisheries, which were held by the same title as the lough fisheries, were strictly pre-

served. There was no evidence of acts of ownership in respect of the eel fishing in the lough, but the grantees exercised their rights over river and lough by means of weirs in the river, which was the ancient and recognized method of eel fishing. The evidence showed that only in a small portion of the lough had the fishing been protected and convictions for trespass been obtained. On behalf of the defendants, who were fishermen, evidence was given of continuous fishing by the public from time immemorial:—

Held, that, the plaintiffs' paper-title to a several fishery in the whole of the lough being irresistible, and their user under their title being the only reasonable and profitable user, the plaintiffs' title was not displaced by the evidence of long-continued user on the part of the public.

There was no evidence of any damage having been done to the plaintiffs' several fishery, save by the defendants fishing with draft-nets in Toome Bay, a small portion of Lough Neagh, situate at the north-western corner, where the waters of the lough discharge themselves in the Lower Bann river:—

Held, that the injunction against the defendants should be restricted to Toome Bay, with liberty to the plaintiffs to apply in respect of any further injury to their several fishery.

THIS was the trial of an action in which the plaintiffs claimed a declaration that they were entitled to the exclusive right of fishing for eels in Lough Neagh, and an injunction against the defendants to restrain them from fishing for eels in any portion of the said lough, and for damages sustained by the plaintiffs by reason of the defendants fishing for eels in the said lough.

The statement of claim alleged that at and previously to the granting of the Letters Patent, dated 3rd July, 1661, King Charles 2 was seised in his demesne in fee-simple in possession of all the fisheries of what kind soever of and in the pool of Lough Neagh, situate in the Counties of Down, Tyrone, Armagh, Antrim, and Londonderry, and the River Bann, and also all the islands in the said lough, and the bed and soil of the said lough.

The claim then set out a grant, dated 3rd July, 1661, by Charles 2, to Arthur, Earl of Donegall, of all the fishings and fishing places of what kind soever in Lough Neagh and the River Bann, and traced the title down to the present plaintiffs, the lessees under the present Earl of Shaftesbury of the said fishings. The claim alleged that poaching for eels had been extensively carried on in the said lough, and that the defendants from time to time had broken into and entered the premises,

Ross, J.
1908.

O'NEILL
v.
JOHNSTON.

the property of the plaintiffs, and captured a large quantity of eels to the detriment of the plaintiffs, and of their fishing and fishing rights in the said lough, and also to the injury of the plaintiffs' other eel fisheries in the River Bann.

The defendants, by their defence, denied that King Charles 2 was seised in his demesne in fee-simple in possession of the fisheries and lands of Lough Neagh, and in the River Bann; they denied the plaintiffs' title as set forth in the statement of claim; they also denied the existence of a several fishery in Lough Neagh. The defendants further said that the said pool or lough, called Lough Neagh, at the time of the alleged acts complained of, was, and still was, and from time immemorial had been, a public and common navigable inland sea, and that every subject of the realm had, and of right ought to have, the right and privilege of fishing in and upon the said lough. As a further and alternative defence the defendants said that long prior to the several grants in the statement of claim specified, and in particular prior to the Letters Patent of King James 1, by divers royal grants, letters, and instruments, which had now been lost or destroyed by accident, the said King James 1, and other kings of England him preceding, did erect, confirm, grant, and establish a free and public common of piscary in or upon the said pool or lough, and the said king and kings did further in the divers instruments aforesaid dedicate to the public and general use of the said subjects all rights, members, easements, and privileges, about, in, and concerning the waters and soils of the said lough, necessary and proper to the full and free exercise of the public common of piscary aforesaid; and the said common of piscary had ever since been publicly used as such by the subjects of the realm: and that it was in exercise of the said free and public common of piscary, and not otherwise, that the defendants did the acts complained of.

The plaintiffs, by their reply, said that the pool or lough mentioned was an inland freshwater lake, and that the tides and waters of the sea had not at any time flowed and re-flowed therein, or in any part thereof.

The evidence at the trial was given by affidavit. The title of the plaintiffs, and the evidence as to the user by the

plaintiffs and by the defendants, are fully stated in the judgment of Ross, J.

Ronan, K.C. (with him *Jellett*, K.C., and *Gaussen*), for the plaintiffs :—

The plaintiffs hold the eel fisheries in the Lower Bann River by the same title by which they hold the fisheries in Lough Neagh. They have asserted their right to the river fisheries by a long series of actions : *O'Neill* v. *M'Erlaine* (1). In *Bristow* v. *Cormican* (2), which was with reference to the scale fishery in the lough, the House of Lords held that the question was one for a jury. In that case the defendants' plea of a public right to fish was held bad on demurrer, and there was no appeal on this point. Therefore, it is established law that there cannot be a public right of fishing in Lough Neagh. The only question that remains now is, whether the fishing belongs to the plaintiffs or to some other person. As to user under their Patents the plaintiffs prove convictions against members of the public for fishing in parts of the lough. The defendants rely—(1) on a public right of fishing ; (2) on lost grant; but the public cannot take by grant. A lost grant can only be assumed where the law allows a grant to be made. The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river, even though it be navigable : *Smith* v. *Andrews* (3).

Gordon, K.C. (with him *Healy*, K.C., and *J. P. Kerr*), for the defendants :—

Assuming the plaintiffs' inquisitions and Patents to be good, a patentee may abandon his rights, and if he does so, his rights which belonged to the Sovereign go back to the Sovereign ; but the patentee cannot after 300 years come back and put out the public, whether or not the public have any title. The exercise by the plaintiffs of acts of ownership over other parts of the property cannot be evidence of their ownership over the part in question here. The value of inquisitions as evidence is still open to dispute : Taylor on Evidence, section 1674; Phipson on

(1) 16 Ir. Ch. R. 280 ; 17 Ir. Ch. R. 86.
(2) I. R. 10 C. L. 398 ; 3 App. Cas. 641.
(3) [1891] 2 Ch. 678.

Ross, J. 1908. O'Neill v. Johnston.

Evidence p. 327; *Irish Society* v. *Bishop of Derry* (1). The King has no right in inland rivers and non-tidal lakes. The inquisition of 1605 finds only half the lough to be in Queen Elizabeth. The title of the plaintiffs is so doubtful that no Court could say that there was a clear, irresistible paper-title in the plaintiffs. In addition to this defective paper-title, you have the fact that no person claiming under this title ever attempted to exercise any right of fishing for eels or to make any lease of the eel fisheries, even for the purpose of safeguarding the weir fisheries, and the right of fishing was openly invaded by the public.

Healy, K.C.:—

The Crown has no more right to grant a several fishery in non-tidal waters than it has in tidal waters since Magna Charta. No presumption can be made in favour of the title of the Crown: *per* Fitzgerald, J., in *Bristow* v. *Cormican* (2). The statutes 17 & 18 Geo. 3, c. 19, 39 Geo. 3, c. 51, and 44 & 45 Vict. c. 66 (Pollen Act, 1881), all dealt with Lough Neagh on the basis that it was a public lake. The Dynamite (1877) Act (40 & 41 Vict. c. 65) was in England extended to all private fisheries; can it be suggested that Parliament thought that Lough Neagh was not a public fishery? The Act 5 & 6 Vict. c. 106, s. 65, prevented the use of nets for the taking of salmon and trout, unless where a general public right of fishing existed; yet, although this statute was in force, no one went for an injunction until *Bristow* v. *Cormican* (2) (as regards salmon) and the present case (as regards eels), and there is no case at all as regards other fish. In the last-mentioned statute a "common of piscary," otherwise a public right of fishing, is recognized in an inland lake. In section 114 a "several fishery" is defined to mean an exclusive fishery possessed and enjoyed as such by virtue of grant, patent, or charter, or by Act of Parliament, or by prescription, provided that nothing should be construed to lessen or abridge "any public right of fishing by lawful means and in lawful seasons heretofore enjoyed and exercised within the limits of any such several fisheries." By the Act 13 & 14 Vict. c. 88, s. 7, rating was

(1) 12 Cl. & F. 641. (2) I. R. 10 C. L. 398, 422.

extended from several fisheries to all productive fisheries; yet this fishery has never been rated as a fishery at all. Lough Neagh, unlike Lough Erne, was not formed by the swelling of a single river: sixteen rivers flow into it, and the Erne case does not affect it: *Bloomfield* v. *Johnston* (1).

No land could be granted by Letters Patent until the King's title was found by inquisition: 18 Henry 6 (1439), c. 4. The law of the land was the law of Magna Charta: "No freeman shall be disseised of his freehold, but by lawful judgment of his peers or by the law of the land." In this case the pretended inquisitions were made after, and not before, the Patents. The so-called Patents were simply letters of marque, and were not under the Great Seal of Ireland. The statute 8 Henry 6, c. 16, required the return to be within one month of the inquisition and a regular panel to be taken by the sheriff. The inquisition of 1605 was not enrolled till 1684. The Patent of 1661 is bad, as no inquisition was had, except an inquisition had years before. As to the 1621 inquisition, there was no jurisdiction in the sheriff to go outside Antrim, even if Antrim was a county then. The grant by Cromwell is bad as a usurpation. The lease by Charles 2 to Clotworthy is bad, as there was no inquisition. Even if the attainder of Shane O'Neill put his own lands in the King, Shane O'Neill had no title to the lake which formed their eastern boundary; and in any case, under either the Irish customs or English law, Shane was not the right heir to the O'Neill territory, and its lands never vested in the chief: Maine's Early Institutions, p. 92. The Act for the attainder of Shane O'Neill does not cover Lough Neagh.

Unless Lough Neagh was put in defence before Magna Charta, there could be no several fishery in Lough Neagh—whether tidal or non-tidal. The Bann was in the hands of monasteries, and was put in defence before Magna Charta. Therefore there could, if English law extended to unconquered territory, be a several fishery before Magna Charta, which, being forfeited, could be regranted. Section 180 of the Irish Act of Settlement (17 & 18 Charles 2, c. 2) shows that the

(1) I. R. 8 C. L. 68.

Ross, J. 1908. O'NEILL v. JOHNSTON.

manor of Edenduffcarick (now Shane's Castle) was in Lady Antrim, in 1665, and not in the grantees, as it would have been if their Patent were a reality. The fact that Lough Neagh was put in defence was pleaded in *Bristow* v. *Cormican* (1), but was not pleaded here. The plea that Charles 2 was seised in his demesne in fee-simple of the fishery is bad. The plea ought to have been that the lough was put in defence before Magna Charta.

Jellett, K.C., in reply:—

The Act of attainder of Shane O'Neill gives the boundaries of Tyrone's lands, "along the west of Lough Neagh, and the lands of Clannaboy on the east of Lough Neagh." The plaintiffs' user of the lough in fishing for eels by taking them at the point of exit was the only possible user. As to user by weirs, see *Neill* v. *Devonshire* (2), *per* Lord Selborne, at p. 144. "Abandonment" is a term which has no legal meaning as to an incorporeal hereditament such as a several fishery": *per* Lord Selborne, *Neill* v. *Devonshire* (2), at p. 154; *Rogers* v. *Allen* (3); *Lord Advocate* v. *Lord Blantyre* (4). The 1621 Patent gave the fishery to Chichester; he surrendered it to the Crown; therefore no inquisition was necessary for the 1661 Patent. For further acts of ownership by persons claiming under the 1661 Patent, see *Hamilton* v. *Donegall* (5), *Irish Society* v. *Crommelin* (6).

Feb 28.

Ross, J.:—

In this action the plaintiffs pray for a declaration that they are entitled to the exclusive right of fishing for eels, and to all eel fisheries in Lough Neagh, for the residue of a term of 5000 years granted by a lease of 18th July, 1905.

The plaintiffs' title depends upon certain Patents from King James 1 and King Charles 2, purporting to convey the fisheries and the lough itself. The defendants deny that prior to the Patents the King was seised of the fisheries and soil of Lough

(1) I. R. 10 C. L. 398.
(2) 8 App. Cas. 135.
(3) 1 Camp. 309.
(4) 4 App. Cas. 770.
(5) 2 Ridg. 267.
(6) I. R. 2 C. L. 324, 501.

Neagh. They deny the plaintiffs' title throughout the lough. They also plead that Lough Neagh is a public navigable inland sea in which every subject of the realm has the right of fishing. They also plead a prior dedication by the English Kings of a free and public common of piscary in Lough Neagh.

At this point I desire to state two propositions of law. The first is that the Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. The second is that no right can exist in the public to fish in the waters of an inland non-tidal lake.

Lough Neagh is the largest inland sea in these islands. It is twenty-four miles long, about ten or twelve miles broad, navigable throughout, and bounded by five counties. Thirteen rivers flow into it, but only one river, the lower Bann, flows out of it. It abounds in fish, and in particular in eels, salmon, and pullen or fresh-water herring. Those claiming under the Patents have never prevented the fishermen residing in the locality from fishing for pullen and other fresh-water fish, which are of no great value; but in respect of the salmon and the eel fishings, which are of great value, considerable litigation has taken place, to which I shall afterwards refer. Toome Bay is at the north-western corner where the waters of the lough discharge themselves into the lower Bann river. In this bay the eels in enormous quantities congregate in the autumn of each year previous to their departure for the sea.

Eels are viviparous and produce their offspring in the sea. The young eels ascend the River Bann in the spring. They distribute themselves through the lough, and the rivers that flow into it. The growth of the eel is exceedingly rapid. When they come up in the spring, they are mere threads. When a few months after they assemble in Toome Bay, many of them weigh several pounds. Practically no eels of the ordinary species are left in the lough. They all proceed seawards through the lower Bann. From the most ancient times eel weirs have existed on the Bann. They are mentioned in the oldest documents. It is probable that they belonged to the religious houses, and were confiscated in the time of Henry 8. The property in these eel fishings is no longer in dispute. The plaintiffs hold them

Ross, J. 1908. O'NEILL v. JOHNSTON.

under the very Patents by virtue of which they now make this claim to the exclusive eel fishings in Lough Neagh. The defendants submit that the question in respect of Lough Neagh is quite a different question. It is easy to understand that prior to the Patents the Crown became possessed of these fishings through the confiscation of the properties of the religious houses; but it is contended there is no proof that the Crown became possessed of the whole of Lough Neagh. We are aware that immense confiscations of property took place in Ulster in the time of Elizabeth and James 1, but there is no record in evidence to enable us to know in what way the whole lough became the possession of the Crown. The evidence and the surrounding circumstances tend to show that from the earliest times the lough was fished by the inhabitants in the vicinity, and that, save in respect of the fishing in a particular place, from Shane's Castle to Toome, they were not interfered with. This evidence is not admissible to show that the public possessed the right of free fishing, but it is evidence to show that the right of fishing was not in the exclusive possession of those holding under the Patents.

The plaintiffs allege that the present proceedings are brought to protect Toome Bay from a kind of fishing that is ruinous to the eel fishing in the river. They allege that within the last few years there has been considerable trespass in Toome Bay by persons fishing with large draft nets. These nets were unlicensed, the Conservators holding that they were not bound to issue licenses for such nets. But the Court of Appeal in Ireland decided in February, 1906, that the Board of Conservators are bound to issue licenses for eel draft nets to persons requiring the same on tender of the maximum amount chargeable therefor. It is alleged that last season Toome Bay was invaded by boats equipped with the nets. Considering that the nets are over 100 yards long, 30 feet deep, with a fine meshed tail of about 10 yards, it is plain that a number of boats fishing in succession in the Bay at the time when the eels are congregated there, must practically put an end to the eel fishing in the Bann. The license of course confers no right on the licensee against an owner of a private fishery.

I now propose to examine the title. First, there is a document attached to the following inquisition, which is evidently a commission. It is for the most part illegible. By inquisition taken at the town of Antrim in the county of Antrim, 12th July, 1605, it was found that Queen Elizabeth was, in her lifetime, seised in her demesne as of fee, in right of her Crown of England, of all manner of fisheries, as well of salmon as of eels and other fish, in and over the moiety of Lough Eaugh, *i.e.*, Lough Neagh, which is towards the east parcel of Claneboy, and of certain ancient eel weirs in and over the River Bann, next Castle Toome, and of a certain free fishery of eels, salmon, and other fish therein and over the said river in Claneboy. That the premises had been granted by the Queen to Sir Thomas Smith and his son, Thomas Smith, by Letters Patent of 16th November, 1571, on condition that they, their heirs or assigns, were able to obtain possession against the Irish before 28th March, 1579. That they had failed to do so, and the premises reverted to the Crown. That on the death of Queen Elizabeth her cousin King James was her heir, and at the time of taking the inquisition the King was possessed of the premises.

As the year began in March, the following Patent, dated 14th of February, is of later date and consequent upon the inquisition of 12th July.

By Letters Patent of 14th February, 1605, King James I granted to James Hamilton, his heirs and assigns, the entire fishing of every kind whatsoever of and in the pool of Lough Neagh, and the river of the Bann as far as the rock and fall of water called the Salmon Leap, in the counties of Down, Tyrone, and Antrim, and the county of Coleraine (now Londonderry) and the confines of the same in the parts of Ulster, together with certain old weirs for taking eels in and over the River Bann, near Castle Toome. And full right and liberty of taking and carrying to or from salmon and all kinds of fish in the said pool of Lough Eaugh and the Baun within the limits aforesaid; and the bottom and soils of them and every of them with their appurtenances; and also full power of approaching the banks of the said pool and river from every part within the limits aforesaid, and of placing nets and other things necessary for fishing and of doing all things which

Ross, J. 1908.

O'NEILL *v.* JOHNSTON.

shall be requisite to enjoy the premises, together with all islands of the pool and river aforesaid which are of the value per annum beyond reprises of twelve shillings and sixpence.

In the Crown rental for the county Antrim, 1619, we find that Arthur, Lord Chichester, assignee of James Hamilton, Knight, holds the entire fishery in the lake of Lougheagh, *alias* Sidney, and river of Bann at 12*s.* 6*d.* per annum.

In the year 1621 we find a commission from King James I to the Bishop of Dromore and others to inquire of what castles, territories, dissolved monasteries, waters, and other hereditaments within certain counties, including Antrim, Tyrone, Donegal, and Londonderry, and in Claneboy, Arthur, Lord Chichester, was seised or possessed, the quantities, qualities, and values thereof, and how much came to the King's hand by reason of attainders, forfeitures, surrenders, Acts of Parliament, or escheats, or by any other title or means whatsoever.

By inquisition consequent on this commission taken at Carrickfergus on the 6th April, 1621, it was found, after reciting the Letters Patent to James Hamilton of 14th February, 1605, that King James I was seised in his demesne in right of his Crown, at the time of making the grant, of the entire fishing of every kind whatsoever of and in the pool of Lough Neagh and the Bann as far as the Salmon Leap, with full right and liberty of taking all kinds of fish in the pool of Lough Neagh and the Bann and the bottom soils of the same in the counties of Down, Tyrone, Antrim, and Londonderry, and the confines of the same, together with the eel weirs. Also full power of approaching the banks of the said pool and river from every part, and of placing nets and other things necessary for fishing, together with all islands of the pool or river, and that the said James Hamilton by virtue of the said Letters Patent, being seised in his demesne as of fee to him and his heirs, for good and valuable consideration, by charter of feoffment dated 10th of April, 1606, granted all the premises to Arthur, Lord Chichester, and his heirs for ever.

King James I, by Letters Patent, dated 20th November, 1621, in accordance with the King's letter of 8th August, 1620, granted to Arthur, Lord Chichester, his heirs and assigns for ever, amongst others the Castle and Manor of Belfast, and "all the fish-

ings and fishing places of what kind soever in the lough or poole of Lough Neagh in the river of the Bann and the soils of the said lough or poole of Loughneagh of the river of Bann aforesaid and everie of them with their appurtenances from the lough or poole aforesaid unto the rocks and fall of the water called the Salmon Leape in the said river of Bann being in the counties of Downe, Tyrone, and Antrim, and the county of Londonderry in Ulster or some of them, or in the confynes of them or some of them together also with certain ould eele weares in and uppon the said river of the Bann in the counties aforesaid or some of them and alsoe full power to come to the bancke of the lough or poole and river aforesaid out of all parts of the said lough or poole and river aforesaid within the bounds and limitts aforesaid and thereuppon to lay and put their netts and all other necessaries for fishing and to doe all other things whattsoever which shall be needful or necessary to the enjoying of the premisses."

On 21st October, 1639, King Charles 1 issued a commission to take a surrender from Edward, Viscount Chichester, of Carrickfergus, and Arthur Chichester his son, of all their right, title, and interest of and in the great lough called Loughneagh, *alias* Lough Chichester, and the soil and fishings thereof, together with all the eel wears and eel fishings, pools, creeks, and places to catch eels and other fish at and about Toome, in the county of Antrim, and in the river Bann as far as the rock in the said river commonly called the Salmon Leap, with liberty also for the fishers of the King, his heirs and successors, to dry their nets from time to time upon the banks of the said Viscount and Arthur Chichester's lands adjoining the said lough and river.

On 1st July, 1640, Edward, Viscount Chichester, and Arthur Chichester, his son and heir (afterwards Earl of Donegall), in pursuance of an order of composition and agreement, made 19th September, 1639, surrendered to King Charles 1, his heirs and successors for ever, certain advowsons, and the great lough called Lough Neagh, *alias* Lough Chichester, and the soil and fishing thereof, together with all the eel weirs and eel fishings, pools, creeks, and places to catch eels and other fish at and about Toome in the county of Antrim, and in the river of the Bann, as far as to the rock in the said river, commonly called the Salmon Leap,

Ross, J. 1908. O'Neill v. Johnston.

with liberty for the fishers of the King's Majesty, his heirs and successors, to dry their nets and make up their fish from time to time, and at all times thereafter for ever, on the banks of the said Viscount and Arthur Chichester's lands adjoining to the said lough and river, or either of them.

By indenture, dated the 14th August, 1656, His Highness Oliver, Lord Protector, made a lease to Sir John Clotworthy of Lough Neagh and Toome, together with the fishings and soils thereof, and islands in the lough, and also the lough and river of Bann, to hold for a term of ninety-nine years, from the 13th May, 1656, in as full and ample a manner as the same was surrendered to the late King on the 1st July, 1640, by Lord Chichester, at a rent of £5 for the lough and £35 for the river for the first seven years, and for the remainder of the term £6 for the lough and £44 for the river. The lease contains a proviso that the lease is to be binding, notwithstanding certain matters: amongst them is one to the effect that the lease is to be valid, notwithstanding the not finding or returning of any office or inquisition, and notwithstanding the statute of the 18th of Henry 6.

By indenture, dated the 15th November, 1660, King Charles 2 made a lease for ninety-nine years, from 13th May, 1656, to Sir John Clotworthy, reciting the lease made by the "late unlawful power" of Lough Neagh and the fishings of the River Bann as far as the Salmon Leap. Lord Blackburn observed in *Bristow* v. *Cormican* (1) that this lease contained a clause purporting to be a dispensation from the statute of Henry 6, and inferred that there was not any office found; but I have found this clause in many similar documents of the time, and it appears to be a common form and not a statement of fact.

In the Crown rental of the county Antrim for 1659, Sir John Clotworthy appears as tenant of Lough Neagh and Toome, with the fishings and soil thereof, islands in the said lough, viz. Ram's Island and Coney Island, at the rent of £5, and also as tenant of the lough and river of Bann, as far as the Salmon Leap, containing six salmon fishings, two mixed fishings of salmon and eels, one eel fishing, and one trout fishing, at a rent of £35. Both rents are marked as paid at Michaelmas, 1660, and

(1) 3 App. Cas. 641, at p. 667.

in each case a note is added: "Discharged by order of the Court in Trinity Term, 1661, for the Earl of Donegall."

In the Crown rent receipt book (Auditor-General's Office, 1660), it appears that on the 13th October, 1660, Sir John Clotworthy, as tenant of the "town and lands" of Loughneagh, in the county of Antrim, at 100 shillings per annum, paid 50 shillings for the half year ending Michaelmas, 1660, and also as tenant of lough and river of Bann, &c., at £35 per annum paid £17 10*s.* for the half year ending Michaelmas, 1660.

The Patent 13 Charles 2, 3rd July, 1661, recites the Patent of 20th November, 1621, the surrender to Charles 1, the lease to Sir John Clotworthy, and then grants to Arthur, Earl of Donegall, the fishings in the lough and in the River Bann, and the soil of the lough and the river in the counties of Down, Armagh, Tyrone, Antrim, and Londonderry, with power to lay nets on the banks, and grants the rents payable in respect of the Clotworthy lease, and the reversion and remainder of all the premises. Title is duly traced by the deeds in evidence from the said Arthur, Earl of Donegall, to George Hamilton, third Marquess of Donegall. Under the settlement in the events that happened his only daughter, the Countess of Shaftesbury, became entitled to the property. Finally, under a settlement of 11th February, 1891, the property is settled on Lady Shaftesbury for life, with remainder to her son, the present Earl of Shaftesbury, for life, with remainder to his first and other sons. The settlement contains an ample leasing power to be exercised by each tenant for life.

All these deeds and settlements purport to deal with Lough Neagh, the River Bann, and the fishings. The paper-title of the Earl of Shaftesbury covers a period of three centuries; and the reversion expectant on the term of 5000 years is now admitted to be vested in him.

We must now consider in what way the Donegall family, as proprietors of the lough and river, dealt with their property. The eel fishings went one way, and the salmon fishings went another. First, with regard to the eel fishings—No dealings by the Donegall family with the subject-matter of the grant can be expected during the period covered by the lease to Clotworthy, that is from 1660 to 1755. On 3rd November, 1795, there is a lease from Lord

Ross, J. 1908.

O'NEILL v. JOHNSTON.

Donegall to Samuel Tynaston for thirty-one years of the eel fishery near Toome.

By a lease of 1st August, 1827, George Augustus, Marquess of Donegall, in consideration of £7384 12*s.* 5*d.*, and in consideration of a yearly rent of £369 4*s.* 7*d.*, demised unto Earl O'Neill portion of his fishings held under the Patent, namely, the eel fishing within the River Bann near Toome Bridge, and the weirs, dams, and appurtenances to the said fishery, within the accustomed limits of the fishery, reserving all salmon and trout, and other scale-fish within the limits of the fishery, for the term of 5000 years. Earl O'Neill died in the year 1841, and his interest in the eel fishing passed under his will to his brother, John Bruce Richard, Viscount O'Neill.

On the 28th September, 1850, Viscount O'Neill, in consideration of £1625, assigned his interest in the premises for the remainder of the term to the Commissioners of Public Works. On the 25th June, 1855, the Commissioners of Public Works, in consideration of £2800, assigned the said eel fishery to John O'Neill for the residue of the term. The said John O'Neill made his will on 19th February, 1869, and died on 24th June, 1869. An administration suit followed, and by an order made therein the plaintiff, Edward Armstrong O'Neill, was permitted to enter into possession of the rents and profits of the real and leasehold estates, and of the eel fishery under the said lease. The said Edward A. O'Neill has made several sub-leases of the eel fishery. On 28th January, 1903, it was agreed between the Earl of Shaftesbury and those representing the estate of John O'Neill, with the approval of the Court, that the lease of 1st August, 1827, should be surrendered, and that thereupon the Earl of Shaftesbury should grant a lease of the Toome eel fishery and the other eel fisheries on the Bann, from Toome Bridge to the Salmon Leap at Coleraine, and the eel fishing in Lough Neagh, for a term of 5000 years, at a rent of £884 4*s.* 7*d.*

Accordingly, by a lease dated 18th July, 1905, the Earl of Shaftesbury demised the eel fisheries in the lough and the river as aforesaid, and the fishing places for eels in the lough for the said term, and subject to the said rent, to Edward Armstrong O'Neill, but subject to a fee-farm grant of the scale fishing, dated 28th January,

1857. By a subsequent deed the said Edward Armstrong O'Neill conveyed the lessee's interest to certain trustees of the settlement created by the will of John O'Neill, who are joined with others as plaintiffs in this action. The other two plaintiffs are Stewart A. M. Bruce and Wm. Ellis, who hold all the said fishings and fishing rights under a lease for twenty-one years, made on 20th October, 1905, at a rent of £2550. This completes the paper-title of all the plaintiffs to the eel fishing, and as a paper-title it is complete and unassailable.

We have now to consider how the scale fisheries were dealt with by persons claiming under the Patent. By lease, dated 3rd October, 1803, George Augustus, Marquess of Donegall, demised to Edward May the salmon, trout, and scale fishings of Lough Neagh, and of the River Bann, with the appurtenances in the counties of Tyrone, Antrim, and Liberties of Coleraine for the purpose of taking salmon and other fish within the known and accustomed limits of the fisheries, for the term of sixty-one years, at a rent of £50. At the hearing of the appeal in *Bristow* v. *Cormican* (1) in the House of Lords the absence of the lease of 1803 is the subject of comment. It was required to show the limits of the lease of 1811. But now that it is produced it does not define the limits accurately. A point was made by counsel for the defendants that in the lease of 1803 the words "Lough Neagh" are written on an erasure, and that in the memorial Lough Neagh does not appear at all, but only the River Bann. On consideration I think there is nothing in the point, because down to 1834 the deeds and memorials were not compared by the officials in the office, and further the lease of 1803 was surrendered, and by the lease of 1811 Lough Neagh was expressly demised.

By lease, dated 1st November, 1811, George Augustus, Marquess of Donegall, demised to Sir George Hill the salmon, trout, and scale-fishings of Lough Neagh and of the River Bann, as far as the Salmon Leap, with the appurtenances in the counties of Down, Armagh, Tyrone, Antrim, Londonderry, and the Liberties of Coleraine, for the purpose of taking salmon and other fish, except eels, within the known and accustomed limits, as late in

(1) 3 App. Cas. 641.

Ross, J. 1908. O'Neill v. Johnston.

the tenure of the Reverend Edward May, by virtue of the lease of 1803, which had been surrendered, reserving the eel fisheries of Lough Neagh and the River Bann, and further reserving the right of angling to the lessor for sixty-one years, from 1st May, 1811, at a rent of £60.

By lease of 31st March, 1829, George Augustus, Marquess of Donegall, granted to John Wallace for lives renewable for ever, but subject to the lease to Sir George Hill, in consideration of £600, the salmon, trout, pullen, and scale fishings of Lough Neagh and the River Bann, for the purpose of taking salmon and other fish, except eels, excepting and reserving the eel fisheries of Lough Neagh and the River Bann, and reserving the right of angling as before to the lessor, for lives perpetually renewable, at a rent of £55 7*s.* 6*d.* It appears that John Wallace took the said grant as trustee for Nicholas D. Crommelin. On the 28th January, 1857, George Hamilton, Marquess of Donegall, executed a fee-farm grant, in lieu of the lease of 1829, to the said Nicholas D. Crommelin, the rent being £60 sterling.

By a sub-lease dated 31st May, 1837, which recites that all the lessee's interest in the lease of 1811, made by the Marquess of Donegall to Sir George Hill, has become vested in Sir George Duckett and Alexander Henderson, the said Sir George Duckett and Alexander Henderson demised to Earl O'Neill the salmon, trout, pullen, and scale fishing of Lough Neagh and Lough Beg (a lough in the river Bann) and of the river and branches belonging to the same with the appurtenances in the counties of Down, Armagh, Tyrone, Antrim, and Londonderry, for the purpose of taking salmon and other fish, except eels, within the accustomed limits of the said fisheries, excepting and reserving the river Bann and the rivers and branches appertaining thereto, and the fishings thereof, and excepting the eel fisheries, for the term of thirty-five years, to commence from 1st May, 1837 (except ten days), at a yearly rent of £100.

By an indenture of 9th July, 1872, which recites the lease to Wallace of 1829 and the fee-farm grant of 1857, James Thompson Bristow and John Graves Livingstone, in whom had vested the interest of Nicholas D. Crommelin under the fee-farm-grant, granted to the Irish Society the salmon, trout, and scale fishing of

the River Bann, but exclusive of the salmon, trout, and scale fishing of Lough Neagh, for ever, subject to the payment of £60, the fee-farm rent.

By an agreement made 16th February, 1877, certain persons claiming under Nicholas D. Crommelin made a yearly letting of the salmon, trout, and pullen, and other scale fish between Black Rock point and Shane's Castle, at a rent of £55.

The Donegall rentals show payments of large rents for the Bann fisheries from 1775 to 1816. There are also some payments of rents in respect of what are called the fisheries of Lough Neagh. In the rental for 1844 we find the rent of the salmon fishery leased to Sir George Hill, £55 7*s.* 9*d.* This payment entered in the same way is carried on to 1847. It was the subject of comment in the House of Lords that after 1829 this rent ought to have been paid to Wallace and not to the Donegall family. But the rents being the same, this may have been a matter of arrangement for the sake of convenience. There are a number of leases of the eel fisheries on the Bann other than Toome eel fishery from 1803 to 1873, which I find unnecessary to set out with particularity.

I have now to consider the litigation that was undertaken by persons claiming to enforce their rights under the Patent.

In 1864 a possessory petition was filed by John O'Neill and others, praying that Patrick M'Erlaine and others should be restrained by injunction from fishing in any part of the River Bann within the limits of the several fishings created by Patents of James 1 and Charles 2. The Lord Chancellor made a conditional order; and on the motion to show cause the Master of the Rolls directed certain issues to be tried at the ensuing Antrim Assizes. The trial was held before Mr. Justice Fitz Gerald, and resulted in a verdict for the plaintiff; but the jury found that there was no evidence to show whether what is called the New Cut existed at the time of the Patent. The order was made absolute, but it only covered the fishery created by the Patent, and left the question as to whether the New Cut was part of the Bann undetermined. This order was reversed on Appeal in 1865: *O'Neill* v. *M'Erlaine* (1).

(1) 17 Ir. Ch. R. 86.

Ross, J.
1908.

O'NEILL
v.
JOHNSTON.

In 1879 the Marquess of Donegall, with the lessees of the Toome eel fishings and the lessees of the Portna fishery, which is below the Toome eel fishery, as co-plaintiffs, brought an action in the Common Pleas Division against Hugh Devlin, claiming damages for trespass to his several fisheries. The defendant did not dispute the plaintiff's title to the River Bann, but contended that the New Cut was not part of the River Bann at the time of the Patent of Charles 2. The case was tried before Lord Justice Fitz Gibbon and a jury, at Belfast, in 1879, and resulted in a verdict for plaintiff: the jury finding, *inter alia*, that the New Cut was part of the River Bann at the date of the Patent of Charles 2. The defendant obtained a conditional order for a new trial; the plaintiff showed cause against it before the Divisional Court, and had it discharged.

Again, in the year 1890, the trustees of the will of John O'Neill brought an action in the Court of the Vice-Chancellor against James M'Erlaine and other fishermen, claiming that they might be quieted in the possession and enjoyment of the Toome eel fishery. The action was tried in July, 1893. The Vice-Chancellor decided in favour of the plaintiff, and granted an injunction. The defendants appealed, and the Court of Appeal dismissed the appeal.

Again, in November, 1897, the Countess of Shaftesbury and others claiming under the Patent brought an action against John M'Erlaine and others, claiming a declaration entitling her to all fishing and fishing-places in the Bann and all the eel weirs from Lough Neagh to the Salmon Leap. Owing to the death of the plaintiff, the proceedings were continued in the name of her son, the present Earl of Shaftesbury. Judgment was given in default of defence in the terms applied for, and an injunction was granted.

In this way the claim of the plaintiffs to the fishing in the River Bann under this very Patent that is now impeached was established by the verdict of a jury, supported by the decision of a Divisional Court, and was subsequently upheld by two decisions of the Vice-Chancellor, one of which was tested in the Court of Appeal. These matters so far as the River Bann is concerned are no longer in dispute, and the plaintiffs' rights under the Patent to

the fishings in the river have not been challenged in this action. As regards the fishing in Lough Neagh, several convictions were obtained by Lord O'Neill and his successors for trespasses committed in the vicinity of Shane's Castle. There were two in 1862, and one in 1868, for trespass to a several fishery.

I now come to the action of *Bristow* v. *Cormican* (1), which was tried by Mr. Justice Lawson in 1874. The action was brought by the trustees of S. N. Delacherois Crommelin, in whom the grantees' interest in the grant of 28th January, 1857, was vested—for trespass on the plaintiffs' several fisheries in Lough Neagh, at a place called Feumore, and on the land of the plaintiffs covered by water, and for conversion of the plaintiffs' fish. The defence upon which everything turned was a traverse of the plaintiffs' property in the several fisheries and in the land covered by water. The plaintiffs in their proofs only began with the lease of Charles 2 to Clotworthy: they proved the convictions I have mentioned, obtained by Lord O'Neill and his successors; but they could prove no acts in the neighbourhood of Feumore, where the alleged trespass occurred. A large number of witnesses were produced for the defendants, who proved that they fished both at Feumore and through the entire of Lough Neagh. This evidence made it incumbent on the Judge to put a question to the jury to ascertain whether the lough fishings were in the Crown at the date of the Patents. The learned Judge, however, declined to leave this question to the jury, and directed a verdict for the plaintiffs. The Court of Exchequer held that the question ought to have been submitted to the jury. An appeal was taken to the Exchequer Chamber, and that Court was equally divided. The case was then taken to the House of Lords (2), who unanimously decided that there was evidence that ought to have been submitted to the jury, and that there must be a new trial. No new trial has taken place. The learned Judge was asked by the defendants' counsel to direct a verdict for the defendants, and he refused to do so, and all the Judges thought he was right in so refusing. The view of the House of Lords I understand to be that it was a jury question. There was evidence on

(1) I. R. 10 C. L. 398. (2) 3 App. Cas. 641.

Ross, J. 1908. O'NEILL v. JOHNSTON.

both sides. If the jury had found for the plaintiffs or for the defendants, judgment would have followed accordingly. The learned Lords indicated various matters in the plaintiffs' case that were unsatisfactory, and they commented on the absence of several important documents which are now in evidence.

The case made by the plaintiffs in this action is far more complete in every way. Lord Cairns called attention to the want of evidence of seisin in the Crown at the time of the Patents. The Patents purported to grant the land, and this of itself is some evidence; but it is plain that the additional evidence brought forward in this action is of immense importance.

There are the following additional documents, none of which were in evidence in *Bristow* v. *Cormican* (1):—1. The Commission for the inquisition of Antrim, 1605. 2. The inquisition consequent thereon, 1605. 3. The Patent to Hamilton, 1605. 4. The Crown rental of 1619. 5. The Commission of 1621. 6. The inquisition of Carrickfergus of 6th April, 1621. 7. Patent of 20th November, 1621, King James to Lord Chichester. 8. Commission of King Charles 1, 21st October, 1639, to take a surrender from Chichester. 9. Surrender by Chichester and his son, 1st July, 1640. 10. Cromwell's lease to Clotworthy, 14th August, 1656. 11. The lease to May, 1803. 12. Rentals of Donegall estate, 1775 to 1817. 13. The leases and documents dealing with the eel fishings in the Bann.

Then we have the actions and proceedings that have been taken to establish plaintiffs' rights under the Patents to the eel fishings on the Bann. The Commission and inquisition of 1621, now in evidence, I regard as of great weight. Here we have a King's Commission addressed to reputable and distinguished persons, commanding them to ascertain with precision of what property the Crown was seised. We have the inquisition following promptly on the commissions ascertaining the particulars of the property; and then comes the Patent, following the inquisition with the greatest minuteness.

Mr. Healy with great force has tried to persuade me that I am to look upon this as mere stage business, that I am to look

(1) I. R. 10 C. L. 398.

upon the commissions, inquisitions, and Patents as so much paper, because it does not appear in what way the property found its way into the Crown, whether by surrender, attainder, escheat or forfeiture. The plaintiffs, however, cannot be expected to prove this. We must assume that sufficient evidence was given upon which the findings of the inquisition were founded; and I think, considering the distance in point of time, I am warranted in adopting in the first instance the conclusion solemnly arrived at and attested, that the soil of the whole lough and river, and the fishings, were vested in the Crown prior to the Patent of Charles 2.

The evidence establishes that there has always been unrestricted fishing over the greater part of the lough; that in that part of it from Shane's Castle to Toome Bay the fishing has been protected and trespassers kept off; that in the small portion enclosed by the walls constructed in Toome Bay at the place where the lough discharges itself into the Bann the fishing has been protected. On 24th September, 1900, there were seven convictions for trespass on the several fisheries of Lord Shaftesbury at this place. The fishing in the river from Toome to the cuts near Coleraine have been strictly preserved and the right established. No doubt there has always been considerable line-fishing in Toome Bay and in the other parts of the lough. This mode of fishing did not materially affect the eel weirs in the river, and nothing was done that would have justified such an action as I am now trying. Within the last few years there has been draft-net fishing, but, as nets were unlicensed, it was possible to drive off the boats. Since the decision of the Court of Appeal rendering it imperative to grant licenses, the fishermen using four or five boats in succession have it in their power to capture almost the entire supply of eels fattened in the lough.

Now, how does the matter stand? There have been unquestioned acts of ownership in respect of the eel fishing in the river, and the title has been completely established. There have also been unquestioned acts of ownership in respect of the scale fishery in the lough. There have been no acts of ownership in respect of eel fishing in the lough since the termination of Clotworthy's lease; but the eel fisheries in the lough have always been excepted from the demises and grants of the scale fishings. Further, from the

Ross, J. 1908. O'NEILL v. JOHNSTON.

circumstance that the eels in the lough when they are fit for profitable use must come to the eel fisheries in the river, there has been no necessity for acts of ownership in the lough. Was it incumbent on those deriving under the Patent to patrol the lough at vast expense, when their lessees could obtain all the eels fattened in the lough at their weirs in the River Bann? Were they bound to prosecute the fishermen who were using lines when no appreciable injury was being done to the eel fisheries on the river—when, substantially, all the eels were taken at the weirs? Were those claiming under the Patent bound to make demonstrations by way of acts of ownership at remote parts of the lough?

This brings me to the consideration of the defendants' arguments; and here let me express my great appreciation of the industry and learning displayed by their counsel, and particularly their junior counsel. There is evidence of continuous fishing by the public in the lough from time immemorial. As the law stands, this cannot establish a right in the public. But it is some evidence that the Crown was not seised of the lough at the date of the Patents. But can this prevail as against the inquisitions and Patents now in evidence, accompanied by undoubted acts of ownership on the subject-matter of the Patents? Inquisitions are not conclusive evidence; but they are of great importance, being judicial or quasi-judicial in their character.

It is contended that the plaintiffs acquiesced in their defeat in *Bristow* v. *Cormican* (1). That, of course, is a very serious matter; but it is not conclusive. The value of the salmon fisheries on the lough would hardly warrant a continuance of such expensive litigation. It is strongly contended by Mr. Gordon that there may be an abandonment on the part of the patentees of some of their rights under the Patent. I confess I cannot see how there can be an abandonment of a *profit a prendre*. There is no authority for such a proposition. There is some evidence that draft nets were used sixty years ago. That may be so, but they were not the formidable engines now used in Toome Bay. It is pointed out that the inquisition of 1605 finds that Queen Elizabeth was entitled to only half the lough, while the Patent grants the whole.

(1) I. R. 10 C. L. 398.

We have no materials for explaining this, but the finding and the grant are not inconsistent, and there may be an explanation. At all events, the inquisition of 1621 finds that, at the time of the Patent to Hamilton of 1605, the King was seised of the whole lough.

Mr. Healy referred to three public statutes, 17 & 18 Geo. 3, 39 Geo. 4, c. 51, 44 & 45 Viet. c. 66, and to four private statutes, all passed to protect the fisheries in Lough Neagh. The existence of these statutes, he contends, is inconsistent with private ownership. There seems to be some force in that; but we must remember that statutes are passed having regard to existing circumstances, and, above all, if a man has a good title to property, nothing in a statute, except express words, can deprive him of that property. The same observation applies to the six Irish Fishery Statutes referred to by Mr. Healy. He then shows that powers are given to owners of several fisheries, and they have not been exercised here; that several fisheries are rateable: the fishery in Lough Neagh has not been rated. In specified counties there is a close time for salmon: Lough Neagh is not treated as a unit. All these points are worthy of comment; but they cannot seriously affect a complete title of the character proved. Mr. Healy contends that the Act for the attainder of Shane O'Neill in 1569 does not cover Lough Neagh; but plaintiffs rely on findings of the inquisition, and I cannot in reason say that they are bound to go further.

Mr. Healy points out that the fisheries in the Bann were disposed of to the Irish Society by a Patent of 1662. We have not the materials to enable us to trace what happened; but it is not material, as the Chichester title under the Patent to the Bann is now beyond dispute, and is acknowledged by the Irish Society. The Society has taken a conveyance of the scale-fishery in the river from the Crommelin family in 1872, in consideration of £2250. Perhaps it tends to show carelessness in making out the Patents. Mr. Healy points out that the inquisition of 1605 was not enrolled till 1684; but all that the statute of Henry 6 requires is a return; and enrolment is not the same thing. As to the other points in the inquisition, the statutes 8 Hen. 6, c. 16, and 18 Hen. 6, c. 4, do not render an inquisition necessary

Ross, J.
1908.
O'NEILL
v.
JOHNSTON.

when before these statutes it was not necessary. The mischief aimed at by these statutes was the Crown granting to third persons lands seised under the inquisitions before the return of the inquisitions. All that is required is that there should be an inquest before a Patent, and that the same should be returned into the Chancery Exchequer, and that a month should elapse before the Patent is made. This is to enable persons dispossessed or aggrieved to traverse the inquisition after its return and before the Patent issues. He contends that the inquisition is local, and that the jurors ought to be taken from all the counties affected. There is no authority for this proposition. Mr. Healy then refers to a large number of statutes of Hen. 6, Hen. 7, Hen. 8, and Elizabeth, showing the importance of finding office.

The statutes for the confiscation of lands in Ireland require the same procedure. But the inquisition relied on seems to have been conducted with particularity, and I am unable to find out any substantial irregularity. If there was anything wrong about the earlier Patent, what was the necessity for a surrender to Charles 1 in 1640, and a commission to receive it? Mr. Healy then reviewed the statutes for the confirmation of titles in Ireland, and showed that under none of them is the Donegall title set up. The plaintiffs do not rely upon any of them. The very fact that they are not dealt with seems to indicate that the owners were satisfied with their title, and that there was no suspicion thrown upon it. He then pointed out that the Patents were passed under the Great Seal of England, and not the Great Seal of Ireland. This point is covered by the 35 Geo. 3, c. 3.

Mr. Healy further contends that the Crown could make no grant of the fisheries in Lough Neagh unless put in defence before Magna Charta. But in *Neill* v. *Devonshire* (1) the words of Lords Selborne and O'Hagan, dealing with this doctrine, refer to tidal waters, and to tidal waters only. There is no authority for the proposition. It is contended that the lough is a navigable inland sea. To be navigable means that the public have the right of passing over it in ships and boats, but it does not follow that they have any other rights. A public right of way by a road does not confer the right of shooting on the road.

(1) 8 App. Cas. 135.

In coming to a conclusion on the whole matter, I am obliged to take upon myself, not merely the responsibility of a Judge, but also that of a jury. As a Judge I must decide what evidence is proper to submit to my mind as a juror; and as a juror I must draw the proper inferences of fact. In the first place, there is no presumption in favour of the plaintiffs; they are not the riparian proprietors, nor can there be any presumption in favour of the Crown, through whom the plaintiffs claim. The plaintiffs must affirmatively establish their title which is impugned. In the first place, have they a good paper-title? It covers a period of three centuries. It has been challenged and investigated in many proceedings, and never more thoroughly than in the present action. No adverse paper-title has ever been discovered. Their title has stood all these tests, and is now, in my opinion, unassailable. But a paper-title is not enough. It can be impugned; it can be shown that it is not a real and effective title at all. Evidence can be given of acts inconsistent with such a title—acts of user done openly by the public for many years, and suggesting immemorial usage. These acts throw upon the plaintiffs the onus of proving that it was a real and effective title. It is incumbent upon me as a juror to weigh all this evidence of user, and to arrive at the proper conclusion of fact.

There is, however, one inference of fact I am not permitted to entertain. I am debarred from inferring that this long-continued user on the part of the public can support the conclusion that the practice had a lawful origin. I repeat that it is clear and established law that the public cannot acquire any legal right to fish in non-tidal waters. The right cannot be acquired by custom or user, however far it goes back. It cannot be acquired by prescription, first, because the public cannot prescribe in respect of any kind of real property; and second, because there can be no prescription in favour of anybody for a *profit a prendre*. There cannot be a presumption of a lost grant in respect of a subject-matter which cannot be the subject of prescription. All the evidence of the defendants cannot establish any right of any kind in themselves. Why, then, is it admissible as evidence at all? It may be suggested that they may not be trespassers, but may be the licensees of some other person who has a title.

Ross, J.
1908.
O'NEILL
v.
JOHNSTON.

The question of fact in such cases, and in this case, is this :— Are these persons fishing by the indulgence of the plaintiffs? or are they licensees of others who have a real title? Why have the plaintiffs acquiesced in their own wrong? Is it want of confidence in their own title, is it good nature, or is there any other cause? There may be, as has been pointed out by Lord O'Hagan in *Neill* v. *Devonshire* (1), instances where there would be required from the plaintiff, for the purpose of resistance, an effort or expense unjustified by the necessity of the case. I think as regards eel fishing we have such an instance here. The ancient and recognized method of eel fishing is by means of weirs. The eel fishing on the Bann was profitable by reason of the existence of Lough Neagh. If the eels did not come to the river, we would have expected that those claiming under the Patent would have made use of some means of catching them in the lough. But they knew that substantially all the eels must at the proper season come to the river, and that by means of their weirs they could capture all they required. If they had equipped steamers to patrol the whole lake, and prevent anybody from catching eels, they would not have improved their own fishing to any substantial extent, and would have wasted their money in a futile manner. Does their omission to act in this way indicate any want of confidence in their own title? Any net-fishing that was carried on in former years, or line-fishing, even in Toome Bay, was comparatively innocuous; but when fishermen tried to interfere with the fishing in the river, which would have been a real injury, the patentees proceeded against them in action after action, and put a complete end to the trespass. Now the rights that they asserted were rights acquired under the Patent, and in no other way.

That Patent granted together the river, in which the eels could be easily taken, and the lough, in which they could not be easily taken. The grantees paid no attention to the fishing in the lough because it did them no substantial injury. But as soon as the practice was initiated of fishing with large modern nets—in Toome Bay itself, where the eels assemble—the grantees take action to prevent this ancient and valuable fishery from being

(1) 8 App. Cas. 135.

utterly ruined. As far as the eels were concerned the grantees exercised their rights over river and lough in the only reasonable way in which they could profitably be enjoyed, and defended their rights when they were injured. As regards scale fishing the state of affairs is somewhat different. It is by no means so valuable as the eel fishing. It is by no means so valuable in the lough as in the river. But in respect of this kind of fishing there have been undoubted acts of ownership in both river and lough. Again we must consider the subject-matter: the enormous extent of the lough, the great expense of protecting such a sheet of water, the value of the fishing to be protected, and the small amount of injury suffered in allowing people to fish.

Having regard to all these considerations, I think that the chief reason for allowing all this fishing on the part of the public was the expense of protecting the whole lough—an expense that would have been out of proportion to any benefit capable of attainment. The alternative presented to my mind is that the title is in some mysterious person under whose license the public fished. This doctrine is really in the nature of a legal fiction. We all know there is no such person, but it suffices to put the plaintiffs on strict proof that they have not merely a paper-title but a real title. A jury is always sorely tempted to strain in favour of a claim of public right. I feel very strongly myself when I am told that there are 700 fishermen and 3000 people in the adjoining counties dependent on this fishing. But this must not be allowed to tempt me into an erroneous inference of fact, involving a great wrong to private persons.

There can be no civilisation, no ordered life, no real progress, when the legal right of even the most obnoxious, the most unpopular, citizen is not upheld against the multitude by the judicial tribunal and enforced by the whole power of the State.

For all the reasons I have indicated I am of opinion that the plaintiffs have established their case. I must therefore declare them exclusively entitled to the eel fishing in Lough Neagh. When I come to consider the form of the injunction, I must remember that the plaintiffs made no complaint of anything that was done outside Toome Bay. The foundation of this whole case was, that they were not affected by such fishing.

Ross, J.
1908.
O'NEILL
v.
JOHNSTON.

The real cause of complaint was the invasion of Toome Bay, with draft nets—unlicensed before the decision of 1906, and licensed since the decision. All they required was a return to the state of affairs existing before the draft-net fishing in Toome Bay was systematically established. My injunction will restrain all eel fishing of every kind in Toome Bay; but it will not extend beyond the entrance to Toome Bay, which I shall mark in a map attached to my decree (1).

The result of the whole matter will probably be that the public will fish simply as they did in former times. If my view of the law is right, their custom of fishing can never crystallize into a right, and on that account I have the satisfaction of thinking that the fishermen will not be interfered with in their ordinary fishing, *i.e.*, to the extent that they enjoyed it before it occurred to some of the defendants to sweep Toome Bay with draft eel nets.

One of the lessees has sworn that the damage done to the eel fishing last season was at least £2000. I order that an account be taken in the Chambers of the Master of the Rolls of the profits made by the defendants and the damages sustained by the plaintiffs, and that the amount so found may be paid to the present lessees.

The defendants must also pay the costs of this action.

Solicitors for the plaintiffs: *French & French.*
Solicitor for the defendants: *F. J. M'Keown.*

D. M. S.

(1) The map was marked by a line drawn from Ballyronan to Gawley's Bay.

IN THE MATTER OF THE ESTATE OF SIR J. A. R. GORE-BOOTH.

Wylie, J.
1908.
May 5, 18.

Settlement—Appointment pursuant to a power to appoint by deed—Part revocation by will—Whether valid.

By settlement, executed on the marriage of G. B., certain lands were vested in trustees for a term of years, upon trust to raise for younger children such sum, not exceeding £20,000 and not less than £10,000, as G. B. should by *deed* appoint, and in default of appointment the sum of £10,000: the said sum so appointed, or the sum of £10,000, to be paid to all or such one or more of the children as the said G. B. should by deed, with or without power of revocation and new appointment, or by will or codicil, appoint. By deed the said G. B. appointed that a sum of £10,000 should be raised immediately after his death, and a further sum of £10,000 after the death of the survivor of himself and another, and thereby reserved a power of revocation of both said sums by deed or will. Subsequently, by his will, G. B. appointed the first of said sums among his younger children equally, and revoked the appointment of the second of said sums:—

Held, that the revocation by will of the appointment by said deed of the second of said sums was invalid, and, accordingly, that the sum so appointed remained a good and valid charge.

QUESTION arising out of the ruling of the final schedule of incumbrances.

By a settlement, dated 29th April, 1867, and executed on the marriage of Henry William Gore-Booth, the lands sold in this matter were vested in trustees for a term of 1000 years, upon trust to raise for younger children such sum, not exceeding £20,000 and not less than £10,000, as the said Henry Wm. Gore-Booth should by *deed* appoint, and in default of appointment the sum of £10,000: the said sum so appointed, or the sum of £10,000, to be paid to all or such one or more of the children as the said Henry Wm. Gore-Booth should by deed, with or without power of revocation and new appointment, or by will or codicil, appoint.

By deed of 29th April, 1879, the said Henry Wm. Gore-Booth, in exercise of said power, appointed that the full sum of

Wylie, J. 1908.

In re Gore-Booth's Estate.

reservation is not expressly authorized by the instrument creating the power; that the formalities to accompany the revocation and new appointment need not be the same as those which were made requisite to the original execution, and that those who can make an absolute appointment can make a qualified one. But still, I think, it is also clearly settled that no exercise of the power is valid that is inconsistent with the intention clearly manifested by the donor of the power in the instrument creating it.

A power to be executed by deed only cannot be validly executed by will, though in certain cases, in favour of certain classes of persons, equity will aid such an execution. Where, as in this case, there is a valid appointment by deed of £20,000, and £10,000 of this is revoked by will, pursuant to a power of revocation, that is, in effect, exercising the power of fixing the amount of the portions by will, contrary to the evident intention of the donor of the power, and would, in my opinion, be invalid unless a Court of Equity would aid. But the Court of Equity will only aid in favour of the children, not against their interests; and the will in this case cuts down their portions by one half.

There is one case in which a question similar to this was discussed, but not decided, viz. *Cooper* v. *Martin* (1). In that case a testator gave an estate upon trust for sale, the proceeds to be held upon trust for his issue in such manner as his wife, at any time or from time to time *before each and every of his children should have attained twenty-five*, by any deed or instrument in writing, to be sealed and delivered, should, either absolutely or with power of revocation and new appointment, direct and appoint; and in default of appointment, for the younger children equally. On the 5th April, 1841, the widow, by deed, made a valid appointment to her three sons, reserving a power of revocation and new appointment by deed. On the 10th April, 1841, she made a will, appointing a portion of the estate to the eldest son. The youngest child attained twenty-five in 1851, and the widow died in 1863, and the question was whether the will was a valid revocation and new appointment. The revocation was held to be invalid, not because of its being by will, but because it did not come into

(1) L. R. 3 Ch. App. 47.

operation until after the youngest child attained twenty-five, which was the limit of time within which the power could be exercised; but in the course of his judgment Lord Cairns said—"For the purpose of expressing the opinion I have formed on the case, I may assume, although I do not mean to decide, that the instrument of the 10th April, though testamentary, ought, in a Court of Equity, to be held to be, as regards form, a sufficient execution of the power in favour of the appellant," who was one of the class in whose favour equity will aid a defective execution. I think from this it may be assumed that, in such a case, where the power is executed by a will which is not in favour but against the interest of the favoured class, a Court of Equity would not aid.

In the same case Sir John Rolt, L.J., in giving judgment, said:—"There can be no doubt of the general rule that, in favour of an object of the power, who is a son of the donee, a Court of Equity will supply the defect where the power which ought to have been executed by deed has been exercised by will, if there is nothing in the instrument creating the power to mark the donor's intention on the subject, beyond the fact that he has pointed to a deed as the mode of executing the power. But the decisions which have thus settled this question have not, I apprehend, determined that it is not competent to a settlor to make the nature and character of the instrument by which the power he creates shall be executed of the essence of the power, without observing which no execution of his power shall be valid. They have all, as I understand them, recognized the principle that anything material to the intention of the donor of the power may not be defeated, and have proceeded (perhaps somewhat singularly) on the opinion that, to a donor who had merely given a direction that his power should be executed by deed, it was immaterial whether it was executed by deed or will. But it is not, I apprehend, to be doubted that equity, in these cases as well as in others, will never uphold an act which the person creating the power has declared, by expression or necessary implication, to be a material part of his intention."

Now, applying that to this case, as the learned Lord Justice applied it in that case, was it not a material part of the intention of the donor of the power, as declared in the settlement of 1867,

Wylie, J. 1908.

In re GORE-BOOTH'S ESTATE.

reservation is not expressly authorized by the instrument creating the power; that the formalities to accompany the revocation and new appointment need not be the same as those which were made requisite to the original execution, and that those who can make an absolute appointment can make a qualified one. But still, I think, it is also clearly settled that no exercise of the power is valid that is inconsistent with the intention clearly manifested by the donor of the power in the instrument creating it.

A power to be executed by deed only cannot be validly executed by will, though in certain cases, in favour of certain classes of persons, equity will aid such an execution. Where, as in this case, there is a valid appointment by deed of £20,000, and £10,000 of this is revoked by will, pursuant to a power of revocation, that is, in effect, exercising the power of fixing the amount of the portions by will, contrary to the evident intention of the donor of the power, and would, in my opinion, be invalid unless a Court of Equity would aid. But the Court of Equity will only aid in favour of the children, not against their interests; and the will in this case cuts down their portions by one half.

There is one case in which a question similar to this was discussed, but not decided, viz. *Cooper* v. *Martin* (1). In that case a testator gave an estate upon trust for sale, the proceeds to be held upon trust for his issue in such manner as his wife, at any time or from time to time *before each and every of his children should have attained twenty-five*, by any deed or instrument in writing, to be sealed and delivered, should, either absolutely or with power of revocation and new appointment, direct and appoint; and in default of appointment, for the younger children equally. On the 5th April, 1841, the widow, by deed, made a valid appointment to her three sons, reserving a power of revocation and new appointment by deed. On the 10th April, 1841, she made a will, appointing a portion of the estate to the eldest son. The youngest child attained twenty-five in 1851, and the widow died in 1863, and the question was whether the will was a valid revocation and new appointment. The revocation was held to be invalid, not because of its being by will, but because it did not come into

(1) L. R. 3 Ch. App. 47.

operation until after the youngest child attained twenty-five, which was the limit of time within which the power could be exercised; but in the course of his judgment Lord Cairns said—"For the purpose of expressing the opinion I have formed on the case, I may assume, although I do not mean to decide, that the instrument of the 10th April, though testamentary, ought, in a Court of Equity, to be held to be, as regards form, a sufficient execution of the power in favour of the appellant," who was one of the class in whose favour equity will aid a defective execution. I think from this it may be assumed that, in such a case, where the power is executed by a will which is not in favour but against the interest of the favoured class, a Court of Equity would not aid.

In the same case Sir John Rolt, L.J., in giving judgment, said:—"There can be no doubt of the general rule that, in favour of an object of the power, who is a son of the donee, a Court of Equity will supply the defect where the power which ought to have been executed by deed has been exercised by will, if there is nothing in the instrument creating the power to mark the donor's intention on the subject, beyond the fact that he has pointed to a deed as the mode of executing the power. But the decisions which have thus settled this question have not, I apprehend, determined that it is not competent to a settlor to make the nature and character of the instrument by which the power he creates shall be executed of the essence of the power, without observing which no execution of his power shall be valid. They have all, as I understand them, recognized the principle that anything material to the intention of the donor of the power may not be defeated, and have proceeded (perhaps somewhat singularly) on the opinion that, to a donor who had merely given a direction that his power should be executed by deed, it was immaterial whether it was executed by deed or will. But it is not, I apprehend, to be doubted that equity, in these cases as well as in others, will never uphold an act which the person creating the power has declared, by expression or necessary implication, to be a material part of his intention."

Now, applying that to this case, as the learned Lord Justice applied it in that case, was it not a material part of the intention of the donor of the power, as declared in the settlement of 1867,

Wylie, J. 1908.

In re Gore-Booth's Estate.

that the power to direct how much should be raised for portions should be exercised by deed and not by will? In the same clause in the settlement, as I have already pointed out, he directs that the power to fix the amount to be raised should be exercised by deed, and the power to distribute the amount so fixed should be exercised by deed or deeds, with or without power of revocation and new appointment, or by will or codicil. Why was this distinction made between the mode of executing these two powers if he did not intend it to be material? It seems to me that the provisions of the deed show that he did intend that the first power should be executed by deed and not by will. And if this will were held to be a valid revocation of a portion of the amount already validly appointed by deed, pursuant to the power, it would be, in effect, fixing the amount to be raised for portions by will and not by deed, contrary to the intention of the donor, as evidenced by the deed creating the power.

In my opinion, therefore, the revocation by will of the appointment by the deed of 1892 of the further sum of £10,000 is invalid, and that sum remains a good charge upon the purchase-money by virtue of that deed, and raisable after the death of Mrs. Usher.

Solicitors for the trustees of the settlement: *Thos. Crozier & Son.*
Solicitor for the trustees of the term of years: *Nathaniel Taylor.*
Solicitors for the vendor: *Thos. Crozier & Son.*

J. E. W.

HURLEY *v.* HURLEY.

(1907. No. 589.)

Barton, J.
1908.
Feb. 28.
March 4.
May 4.

Husband and wife—Chattels real of wife married prior to 1883*—Purchase by husband of reversion in fee—Merger.*

The mere purchase by a husband of the reversion in fee of chattels real, the property of a wife married before 1883, does not *per se* operate as a merger of the terms.

TRIAL OF ACTION.

The plaintiff was the wife of Daniel Hurley, and the marriage took place on 2nd December, 1873. Upon the occasion of the marriage no settlement was executed nor was any settlement afterwards executed.

At the time of the marriage Anne Hurley was entitled to the lessee's interest in certain premises situated in Skibbereen in the county of Cork which were respectively held under two leases, dated 30th April, 1869, and the 11th October, 1869, for the respective terms of 300 years, and made by the Rev. Maurice F. S. Townsend to John Wolfe. The reversion in fee expectant on the determination of these leases was *inter alia* purchased by Daniel Hurley in the Land Judge's Court during the coverture, and by a Landed Estates Court conveyance, dated February 25th, 1898, the said premises were duly granted to him. The conveyance was in the usual way expressed to be made subject to the leases set forth in the schedule thereto annexed, which contained the above-mentioned leases.

Daniel Hurley died intestate and without issue on March 10th, 1907.

The sole question arising in the action was whether the purchase of the reversion in fee by Daniel Hurley operated as a merger of his wife's terms, or whether they survived to his widow, Anne Hurley?

Barton, J.
1908.

HURLEY
v.
HURLEY.

Ronan, K.C., Conner, K.C., and *Norwood,* for the plaintiff:—

A husband cannot get rid of a term, which he has in right of his wife, save by some act in his lifetime amounting to a complete alienation. In the absence of some such express act a term which a husband takes in right of his wife does not merge in the reversion which the husband takes in his own right. Thus the marriage of a joint tenant with a husband who is the reversioner will not have the effect of severing the joint tenancy: *Bracebridge* v. *Cook* (1); even where a charge is given by the husband who is a reversioner, there is no merger. Nothing is clearer than that a term which is taken *alieno jure* is not merged in a reversion acquired *suo jure*: *per* Lord Kenyon in *Webb* v. *Russell* (2). So if a man has a term in right of his wife, and purchases the reversion, there is no extinguishment: *per* Holt, C.J., in *Gage* v. *Acton* (3); see also *Young* v. *Radford* (4). A bargain and sale of the wife's term by the husband was not a sufficient disposition to destroy the term, inasmuch as it only operated through the statute of uses, and was therefore an act of law only, and not an act of the party (Moore, 171). Where the husband was a lessee, and the reversion descended to the wife, there was no merger: *Platt* v. *Sleep* (5). So also, where the reversion was devised to the wife: *Jones* v. *Davies* (6), which is a most important case, and where all the authorities are collected. Sugden expresses the opinion that the purchase of the reversion by the husband of a termor would not extinguish the term: see Sugden's Vendors and Purchasers (14th ed.), p. 619. In *Lichden* v. *Winsmore* (7), cited by him, it was the act of the husband that brought about the union of estates, and yet there was no merger.

An examination of later authorities shows that Sugden's opinion was correct. In *In re Radcliffe* (8) Lindley, L.J., lays down that to work a merger the two estates must vest in the same person at the same time and in the same right. In *Ingle* v. *Vaughan Jenkins* (9) Farwell, J., expresses the opinion (p. 370) that there is no distinction whether the coalescence of interests is brought about by

(1) Plow. 417.
(2) 3 Term Rep. 393.
(3) 1 Salk. 326.
(4) Hob. 3.
(5) 1 Bulst. 118.
(6) 5 H. & N. 766; 7 H. & N. 502.
(7) 2 Roll. Rep. 472.
(8) [1892] 1 Ch. 227.
(9) [1900] 2 Ch. 368.

operation of law, or the acts of the parties. Reference may also be made to *Chambers* v. *Kingham* (1); *Re Butler's Trusts* (2). We, therefore, submit that the view expressed by Preston in vol. iii. of his Conveyancing, and discussed at pp. 273–303, is erroneous.

If an explanation be needed of the *dicta* in some of the early cases, it may be found in the fact that, under the old law, a husband taking a feoffment thereby admitted the lessor's right to enter and make livery, which the lessor could not do during the continuance of the term, and this might have been considered to presume a surrender of the lease.

Ignatius J. O'Brien, K.C., and *A. M. Sullivan*, for the defendant:—

There is a clear distinction between an act of the party and an act of law. A bargain and sale operated through the Statute of Uses, and was, therefore, a mere act of law, whereas a feoffment was an act of the party. Here the Landed Estates Court conveyance constituted a feoffment, and we submit that that amounted to an act of the husband showing an intention to exercise dominion over the wife's chattels, and to renounce the terms. The question arising here is referred to in Williams on Executors (7th ed.), p. 640; and the author expresses the view that the distinction pointed out by Preston between an act of law and an act of the party is supported by the current of authorities. There are three distinct authorities for the proposition that the purchase of the reversion in fee by an executor merged the term (4 Leo. 37, pl. 102; Het. 36; 1 Free., 289, pl. 338). No doubt equity would have interposed to preserve the rights of creditors, but equity would not interpose in the case of the common law rights of husband and wife. Preston's opinion is supported by Cruise: see Cruise's Digest, vol. vi., p. 479. *Carter* v. *Lowe* (3) is a clear decision that merger must be brought about by some act of the parties, and is not brought about by an act of law. Where a baron and his wife were lessors, the enfeoffment of the baron extinguished the term (Cro. Eliz. 712).

All the cases cited in support of plaintiff's contention were

(1) 10 Ch. D. 743. (2) 38 Ch. D. 286. (3) Owen, 56; Mo. 358.

Barton, J. 1908.

HURLEY v. HURLEY.

cases of acts of law only. In *Jones* v. *Davies* (1) the point was expressly left open. Sugden's view is clearly based on a misconception of what was decided there. So far as the *dicta* of learned Judges go, they are evenly balanced. [They also referred to Platt on Leases, vol. ii, pp. 512, *et seq.*; Mayhew on Merger (1861), p. 97.]

May 4.

BARTON, J.:—

The plaintiff, Anne Hurley, married the late Daniel Hurley on the 2nd December, 1873. No settlement was executed upon the occasion of the marriage or subsequently. Prior to and at the time of the marriage Anne Hurley was entitled to the lessee's interest in certain premises in the town of Skibbereen, held under two leases for 300 years, dated respectively, 30th April, 1869, and 11th October, 1869, from the Rev. Maurice F. S. Townsend to John Wolfe. Daniel Hurley, during the coverture, purchased in the Land Judge's Court the fee-simple interest in these and other premises, and by a Land Judge's conveyance, dated 25th February, 1898, the Land Judge granted unto Daniel Hurley the said premises. The grant was expressed to be made subject to the leases set forth in the schedule annexed to the conveyance; and in the schedule these two leases of 30th April and 11th October, 1869, from the Rev. Maurice F. S. Townsend to John Wolfe were set forth, the tenants' names being given as the representatives of John Wolfe. Daniel Hurley died intestate and without issue on 10th March, 1907. Thereupon his widow, the plaintiff, claimed as survivor to be entitled to these two chattel terms; while the defendant, Timothy Hurley, as heir-at-law of Daniel Hurley, claimed that the wife's terms merged in the fee by the husband's purchase of the reversion, and descended to him as the husband's heir-at-law.

No evidence has been offered by either party outside of the bare contents of the conveyance to the husband. The instrument itself does not aid the argument in favour of merger. On the contrary, the conveyance appears to contemplate the continuance of the two terms by scheduling them as leases subject to which the fee is conveyed. There is no evidence of intention, or of any

(1) 4 H. & N. 766; 7 H. & N. 502.

benefit to the husband from which, in accordance with the rule in *Ingle* v. *Vaughan Jenkins* (1), intention might be inferred. The question is presented to the Court as a bare question of law. Was the wife's term necessarily merged by the husband's purchase of the fee?

I need hardly observe that the case is concerned with a marriage before 1883, and that my judgment and its reasoning have no application to a case in which the marriage took place after the passing of the Married Women's Property Act of 1882.

The old authorities (most of which are mere *obiter dicta*) are so conflicting that in 1847 the learned author of Platt on Leases (vol. ii, at p. 515) wrote of them as follows:—

> "I shall not attempt to reconcile them, being convinced that nothing short of modern judicial decision can reduce this confusion to order."

In Sugden's Law of Vendors and Purchasers (14th ed.), 1862, at p. 619, the question is discussed in the following passage:—

> "But if a man, possessed of a term in right of his wife, purchase the freehold, there seems ground to contend that the term will merge, inasmuch as the estates coalesce by his own act, and not, as in the case of marriage, by the act of law; and, accordingly, in one case (Godb. 2; 4 Leo. 38) Dyer held the wife's term to be extinct by the husband purchasing the fee, and Manwood, C.B., agreed with him; and the same doctrine appears to have been held in a case reported by Moore (Mo. 54, pl. 157). Hobart, however, seems to have been of opinion that a purchase by the husband of the fee would not extinguish the term (*Young* v. *Radford*, Hob. 3); and in this opinion Holt appears to have coincided (see 1 Salk. 326). In the case of *Jones* v. *Davies* (5 H. & N. 766; 7 H. & N. 507) this point was discussed, and the Court manifestly leaned to the opinion that the term would not merge, although the second estate be acquired by the act of the husband himself; and this would probably be the determination, although in this case it was not necessary to decide the point."

It was admitted in argument, in accordance with these passages from Platt and Sugden, that the point which I have to decide is one which remains uncovered by direct authority. It must be decided upon principles the consideration of which leads me to the conclusion that there has been no merger.

(1) [1900] 2 Ch. 368.

Barton, J.
1908.
HURLEY
v.
HURLEY.

There does not, in the first place, in my opinion, result from the husband's purchase of the fee that necessary inconsistency or incompatibility of estates which, to quote a remark of Bayley, J., in *Doe* d. *Rawlings* v. *Walker* (1), is "essential to constitute merger." The incompatibility in the case of the purchase of the reversion by a termor is expressed in the rule *nemo potest esse simul dominus et tenens*. But the husband need not be regarded as the sole *tenens* where the wife's chattels real are concerned. Her estate was not devested by the marriage, but continued in her notwithstanding it. This is pointed out in *Bracebridge* v. *Cook* (2), where part of the *ratio decidendi* was thus expressed at p. 418—"because a term of years is a chattel real, in which case the marriage of the wife shall not devest the term out of the wife, but she has an estate in it, as she had before, so that if a stranger ousts them, the wife ought to join with the husband in bringing an *ejectione firmæ*, and the wife shall have judgment as well as the husband."

I need hardly observe that "reduction into possession," which applies to a wife's choses in action, has nothing to do with her chattels real. The husband's right as regards the wife's chattels real is different. It is to dispose of them by complete alienation *inter vivos* during coverture. Until and unless he does so the wife has a continuing estate or interest. It is usually said that during coverture the husband is possessed of his wife's chattels real in her right. But it is a more correct and complete statement to say that the husband and wife are possessed in her right, and it is so stated by some of the best and most accurate writers. Accordingly, when the husband purchases the fee and becomes *dominus*, he does not necessarily become so towards himself alone. A man may be *dominus* towards himself and another, just as he may be trustee for himself and another. There is no more inconsistency in the husband being owner of the fee subject to a term in himself and his wife, than if he were trustee for himself and her.

But a broader and simpler ground for coming to the same conclusion is to be found in the general rule, as expressed in the

(1) 5 B. & C. 111. (2) Plow. 417.

judgment of Lindley, L.J., in *In re Radcliffe, Radcliffe* v. *Bewes* (1), at p. 231: "In order that there may be a merger, the two estates, which are supposed to coalesce, must be vested in the same person at the same time *and in the same right*." The defendant's counsel have naturally placed reliance upon a supposed exception, which, upon the authority of Mr. Preston, has percolated widely. Mr. Preston's proposition was to the effect that where the freehold is held *suo jure*, and the term *alieno jure*, there will be no merger when the estates coalesce by act of law such as marriage, but there will be a merger when they coalesce by act of party such as purchase. If by "act of party" were meant such an act of the husband as necessarily involved the exercise by him of his right to surrender or otherwise alienate the term (*e.g.* accepting from the lessor a feoffment or a new lease to commence *instanter*), the proposition would be an illustration of the rule, and not an exception to it. But Mr. Preston's proposition is far wider and quite different. Mr. Preston's volume on Merger is a classic; and it is with the utmost diffidence and respect that I approach the consideration of anything which it contains. It must, however, be conceded that this particular suggestion of his has never been adopted by any judicial authority. I infer from the allusions to it which occur in the judgments of Pollock, C.B., and Wightman, J., in *Jones* v. *Davies* (2), that it did not favourably impress either of the two Courts which heard the arguments in that case. An observation of Farwell, J., in *Ingle* v. *Vaughan Jenkins* (3), at the foot of page 370, tends still further to weaken the authority of this supposed exception. If a reason or principle could be discovered for the exception, it would certainly have been put forward by Mr. Ignatius O'Brien and Mr. A. M. Sullivan, who argued the case for the defendant, and brought to bear upon it all the research and ability for which it afforded scope and opportunity. But while they were able to point to the same proposition occurring in the works of other writers, they were unable to suggest any adequate reason or principle in support of it. I do not say that Mr. Preston invented this theory. But it probably

(1) [1892] 1 Ch. 227. (2) 5 H. & 766; 7 H. & N. 502.
(3) [1900] 2 Ch. 368.

Barton, J. 1908. HURLEY v. HURLEY.

owes its vitality and its place in several learned law books to the respect which is due to the opinion which he expressed. Having had the advantage of hearing the question fully argued, I can find no reason or authority for engrafting this supposed exception upon the simple rule which was stated by Lindley, L.J., in the passage to which I have just referred.

If, as I observed just now, the purchase was in such a form as necessarily to involve the exercise by the husband of his right to surrender or otherwise alienate the term, a merger would result. But that would not be an exception to any rule. The two estates would, before the completion of the purchase, coalesce by surrender or otherwise in *eadem personâ* and in *eodem jure*. Such was the case of a feoffment under the old law. If the husband of a termor was enfeoffed as in *Downing* v. *Seymour* (1), the term was merged, because by accepting feoffment the husband admitted the lessor's right to enter and make livery, which the lessor could not lawfully do during the continuance of the term. The transaction necessarily involved or presupposed a surrender of the term. It was otherwise with a bargain and sale. This distinction is alluded to in a case, 25 & 26 Eliz., reported in Moore (2). In the days of Elizabeth feoffment was the ordinary common-law mode of conveyance of freehold estates in the case of corporeal hereditaments. When Dyer in the old case in 17 Eliz., which is reported in Godbolt said, "so if a woman hath a term and takes a husband who purchaseth the fee, the term is extinct," and when Manwood added, "the law may be so in such case, because the husband hath done an act which destroys the term, viz., the purchase," these Elizabethan Judges may very well have been thinking of a purchase effected by feoffment. If this be the true explanation of these old *dicta*, it goes far to reconcile the apparent conflict of ancient opinion, and to displace the foundation of Mr. Preston's supposed exception. It also accords with the following passage in the judgment in *Bracebridge* v. *Cook* (3), at p. 469: "Nevertheless the husband might have given away the wife's term by an express act, as if he had made a feoffment of the land, or a new lease, or the like; but inasmuch as he has not done this or anything else

(1) 1 Cro. Eliz. 912. (2) Moore, 171, pl. 374. (3) Plow. 417.

with the land, and has made no disposition at all of it, but has left it to the judgment of the law, the law will preserve the estate of the wife, which estate, as to her, is disjoined from the freehold and the fee-simple." As regards this allusion to the preservation of the wife's estate, I may observe that it is not a case in which equity is called upon to interfere in order to prevent an injustice to the wife. There is no injustice where the husband is merely exercising his right of alienation. But the question in every case is whether he has done so. The law will not impute to the husband the intention to alter the *status quo* to the prejudice of the wife, unless there is something in the transaction to support that inference. In the present case, there is nothing to justify such an inference; and the mere purchase of the reversion by the husband of the termor does not in my opinion necessarily cause a merger.

For these reasons—derived from the learned arguments of Mr. Ronan and Mr. Conner—I am of opinion that the plaintiff is entitled to judgment. The costs must follow the result.

Solicitor for the plaintiffs: *J. T. Wolfe.*
Solicitor for the defendant: *P. Ryan.*

J. MAC M.

Kenny, J.
(for M.R.)
1908.
Jan. 29, 31.

Appeal.
May 12, 13, 18.

ROWE *v.* GOUGH.

Chancery Division, Land Judges' Court—Land Judge's conveyance—Absolute order for sale of lands—Sale of part of lands—Lands sold subject to jointure rentcharge, but indemnified against same by unsold lands—Incumbrances prior to jointure on unsold lands—Rights of jointress.

The jointress in *Rowe's Estate* ([1907] 1 I. R. 380) brought to trial an action to have her jointure rentcharge declared well charged on the part of the estate conveyed to purchasers by Land Judge's conveyances in 1879–1880, and for the appointment of a receiver:—

Held (by Kenny, J.), that, although the jointress was entitled to have her jointure declared well charged on the sold lands, and to an account, yet, having regard to the order of the Court of Appeal ([1907] 1 I. R. 388), this declaration should be made without prejudice to such rights as that order declared to exist in favour of unpaid incumbrancers in the matter of *Rowe's Estate*; and the Judge declined for the present to appoint a receiver or to order a sale, reserving leave to the plaintiff to apply for either or both—the unpaid incumbrancers to have notice of any application for a receiver, sale, or allocation.

The plaintiff having appealed from the order, save so far as it declared the jointure well charged and directed an account:—

Held, by the Court of Appeal, that their order of the 27th June, 1907, being based on their opinion that the prior unpaid mortgagees retained their priority against any claim by the jointress directly, or by the purchasers of the sold lands claiming under the indemnity, the appeal could not be allowed consistently with that order, or with the opinions which the majority of the Court of Appeal then expressed, and by which the Court considered that the present plaintiff was bound; and that, as against the defendants in the present action (the purchasers of the sold lots), she could not require immediate payment from them, so as either to defeat the indemnity or to indirectly throw the jointure on the incumbrancers of the unsold lands.

Holmes, L.J., while concurring in the judgment, on the ground that he was bound by the decision in [1907] 1 I. R. 388, stated that the only reason given by him for objecting to the order then made was that he did not understand its effect; but that, if he had understood it as now interpreted by the majority of the Court, he would have dissented from it on the ground that it was made without jurisdiction, or was an improper exercise of jurisdiction, if any such existed.

Kenny, J. (*for M.R.*) 1908.

ROWE *v.* GOUGH.

By marriage settlement, dated 16th August, 1876, executed in contemplation of the marriage of the plaintiff with Ebenezer H. Rowe, certain lands known as the Rowe estate were put in settlement, and she became thereunder entitled, in the event of her surviving her husband, to a yearly jointure rentcharge of £300 during her life, charged upon the lands mentioned in the deed, but subject to certain prior incumbrances.

On the 24th February, 1875, Ebenezer Rowe presented a petition to the Land Judges for the sale of the lands subsequently put in settlement by the deed of the 16th August, 1876; and on the 5th May, 1875, an absolute order for sale was made. They were divided into fifty-one lots, out of which lots 1 to 46 were, in 1879–1880, put up for sale by the Court by auction.

Condition 13 of the conditions of sale was as follows:—"The several lots of this estate are subject to a contingent jointure annuity of £300, to be payable to the wife of the owner in this matter during her life, in the event of her surviving him, created by an indenture, dated 16th August, 1876. Each of the lots 1 to 46, inclusive, in the rental will be sold subject to the entire of said annuity of £300, but indemnified against payment of any part of same by lots 47 to 51, which will be sold by the Court primarily liable to bear the same in the proportion following" [setting the proportions out]; "and each of said last-mentioned lots will be sold subject, in conjunction with all the other lots in the rental, to the entire of said annuity, but indemnified by the others of said last-mentioned lots in respect of the sum above set opposite each of such lots respectively, and liable to bear the sum set opposite such lot itself in indemnification of all the other lands liable thereto." Twenty-nine lots were sold to purchasers in 1880.

By the Land Judge's conveyance to each purchaser the lands purchased by him were conveyed subject to the jointure of £300 a year, but indemnified against the payment of any part of it by lots 47 to 51, which (with other lots) remained unsold.

Ebenezer Rowe died on the 17th May, 1896, leaving the plaintiff surviving; and her jointure rentcharge having fallen into arrear, she instituted this action in the Chancery Division against the purchasers of the twenty-nine lots sold to purchasers in 1880, to raise the amount of her jointure.

Kenny, J. (*for M.R.*) 1906.

ROWE v. GOUGH.

The portion of the estate remaining after the sale of the twenty-nine lots was not sold by the Land Judge, as intended in 1880, but was, in 1906, in process of sale to the tenants under the Land Purchase Acts, at a price of £47,000, of which sum about £8000 was attributable to lots 47 to 51 (the indemnifying lands).

The incumbrancers upon the unsold lands claiming priority to the jointure rentcharge of £300 amounted to £58,880.

The purchasers of the sold lands applied to the Land Judge for an order that the receiver should pay the rents of lots 47 to 51 (the indemnifying lots) to the jointress, on account of her jointure, the arrears thereof, in indemnification of the purchasers. This application was opposed by the incumbrancers whose incumbrances were prior in date to the jointure. Ross, J., decided that the purchasers of the sold lands, by their conveyances, obtained a charge by way of indemnity on lots 47 to 51 superior to, and in priority of, the incumbrances.

The Court of Appeal varied the decision of Ross, J., and made an order containing the following recital :—"The Court being of opinion that no money will be payable in respect of the said jointure or annuity, or any indemnity provided in respect thereof, out of any of the lands subject to the said jointure or annuity, until it is seen by the result of the sale of the estate in this matter what moneys, if any, are properly applicable to meet the said jointure or annuity and any arrears thereof, after providing for prior incumbrances."

[See *In re Rowe's Estate* (1), and the order of the Court of Appeal, set out in the report at p. 388.]

On the 15th February, 1907, the plaintiff issued the writ in the present action before the Master of the Rolls against the purchasers of the sold lands, *i.e.*, the purchasers of the twenty-nine lots conveyed to them in 1880, in respect of a sum of £3,225 arrears of her jointure rentcharge of £300 a year; and by her statement of claim she asked that her jointure rentcharge might be declared well charged upon and payable out of the lands sold to the defendants, and for an account and the appointment of a receiver.

(1) [1907] 1 I. R. 388.

The statement of claim, after setting out the several conveyances of the lands sold to the respective defendants (and other matters), stated in the 27th paragraph that the lands sold to each of them were respectively expressed to be conveyed by each conveyance indemnified against the jointure rentcharge by each indemnifying lot in certain proportions and against all costs and expenses occasioned by the non-payment of such proportionate part, each of which indemnifying lots had been ordered to be sold by the Land Judge, subject to such proportionate indemnity.

The defendants by their defences pleaded the Statute of Limitations in reference to the claim for arrears of the jointure.

They subsequently obtained leave from the Master of the Rolls to amend their original statements of defence, delivered prior to the order of the Court of Appeal in *Rowe's Estate* (1), and further pleaded by such amended statements of defence that at the date of the sale in 1879 or 1880, all the lands comprised in the absolute order for sale in the matter of the *Rowe Estate*, were subject to various incumbrances, a number of which were still unpaid, having priority to plaintiff's jointure rentcharge, and that the sale was made subject only to the plaintiff's jointure rentcharge and freed and discharged from all other incumbrances and with the benefit of the indemnities against said jointure rentcharge. They then stated the fact that agreements for sale to the occupying tenants of all the unsold lands had been entered into under the Land Purchase Acts, and that proceedings in relation thereto were then pending in the Land Judge's Court, and the defendants submitted that no money was payable in respect of the jointure rentcharge or any arrears thereof out of any of the lands subject thereto.

They also submitted that the plaintiff was not entitled to recover for her own use out of any part of the said lands subject to her jointure, any sum on foot thereof, and that she would be a trustee for the prior incumbrancers of any moneys recoverable by her on foot thereof, or of the arrears thereof; and the defendants further said that their rights as purchasers of their lands under their conveyances indemnified against the jointure by lots 47 to 51, had priority over any claim of the incumbrancers prior to the

(1) [1907] 1 I. R. 388.

Kenny, J. (*for M.R.*) 1908.

ROWE *v.* GOUGH.

jointress to any moneys which would be payable in respect of the jointure, and they submitted that the prior incumbrancers would be trustees for them (the defendants) of any moneys recovered or recoverable in respect of the jointure.

Serjeant O'Connor, K.C., Ronan, K.C., Meredith, K.C., and *Leech*, for plaintiff.

Matheson, K.C., D. F. Browne, K.C., and *James O'Connor*, for Michael Gough and a number of the other defendants.

J. E. Walsh, for the defendants, Mark Rochford, Edward Acton Gibbon, and William Boxwell.

Gerald Horan, for the defendant, Martha Bolger.

[The arguments on the hearing of the case before Kenny, J. (sitting for the Master of the Rolls), principally turned on the construction of the order of the Court of Appeal in *Rowe's Estate* (1), and the effect to be given thereto.]

Jan. 31.

KENNY, J.:—

There is really no question for my determination in this case, except what is the meaning of the order of the Court of Appeal of the 27th June, 1907, in the matter of *Rowe's Estate* (1) as explained by the judgment of FitzGibbon, L.J. In the absence of that order and judgment the plaintiff would be clearly entitled to the relief she seeks, and I have only to consider whether they now preclude such relief or qualify the character of it.

The facts of the case are very simple. By a deed of the 16th August, 1876, which put the Rowe estate in settlement, the plaintiff became entitled, subject to prior incumbrances, to a jointure of £300 a year, charged on all the lands mentioned in that deed. Proceedings in the Landed Estates Court were subsequently instituted for sale of the lands. They were put up for sale in fifty-one lots, and a number of the lots were sold, and conveyed in the years 1879 to 1880 to a number of purchasers, many, if not all, of whom

(1) [1907] 1 I. R. 388.

are defendants in the present action. The form of conveyance in the case of each lot is the same, *i.e.*, the lands are conveyed to the purchaser subject to the jointure of £300 a year, but indemnified against the payment of any part of it by five of the other lots, namely, Lots 47 to 51, which, with others, remained unsold. The rights and liabilities of the various lots, *inter se*, were dealt with by a condition of sale which provided for the distribution of the indemnity in varying amounts over the five lots on which the burden was cast, and for the complete indemnification of all the other lots. The result, in the case of lots sold and conveyed, necessarily was that, though such lands were not as between them and the jointress discharged from the jointure, they were supposed to be completely protected against any liability on foot of it by the indemnifying lots. If any portion of the jointure was levied out of those sold lots, the owner had a right of recoupment from lots 47 to 51. Such were the rights and liabilities of the various lots *inter se*. But as between the lands and the jointress, the latter not alone lost no right which she previously possessed, but, in my opinion, she gained a priority to which she was not previously entitled. The lands are conveyed subject to her jointure alone, and the 61st section of the Landed Estates Court Act is distinct as to the nature and priority of the burden thrown on the lands conveyed. The Landed Estates Court deed is to be effectual to pass the whole estate in the lands "subject to such charges, tenancies, &c., as may be expressed or referred to therein"; but "discharged from all former and other estates, rights, titles, charges, and incumbrances . . . of all other persons whomsoever." In the case before me the effect of the 61st section, in my opinion, is that there is a statutory declaration that the lands sold are subject to no other charge except the plaintiff's jointure—in other words, that it is the first and only charge, and that any incumbrances which had been prior to the jointure no longer, either at law or in equity, affect the property sold and conveyed.

But if the Appeal order and the judgment of FitzGibbon, L.J., are to have the effect attributed to them by defendants' counsel, the very striking result would follow that, notwithstanding the Act of Parliament and the Landed Estates Court deed, there is still a subsisting liability on the part of the sold lands to the

Kenny, J. (*for M.R.*) 1908.

ROWE v. GOUGH.

unpaid incumbrancers—a liability which is apparently to be worked out through the medium of the jointure itself, the gales or arrears of which are to be paid, not to the jointress, but to those unpaid incumbrancers. So far as the liability of the lands themselves is concerned, it is not sought to be extended beyond the limits of the jointure. If the defendants' contention be right, the unpaid mortgagees are remitted to their original rights, so long as in money's worth they are co-extensive with claims on foot of the jointure. I confess that this contention of the defendants, if sound, upsets altogether my notions of what I always understood to be the effect of a Landed Estates Court deed. Not alone might it deprive the jointress of all effective remedy, but, as it seems to me, it might have the result of throwing on the sold lands themselves a burden which they were never intended to bear. Suppose the jointress for her own use levies the jointure off the sold lands, the owner at once proceeds to enforce as against the indemnifying lands the indemnity given by his deed. In that proceeding is he to take priority of the unpaid incumbrancers, or is he to be puisne to them? If the former, then, in effect, the jointure takes priority of all charges that before sale were prior to it. If the latter, as has been decided by the Court of Appeal, then the purchaser's rights of indemnity may become worthless unless the indemnifying lands are sufficient to discharge both incumbrances and jointure.

Now, what is the basis of the defendants' contention? Ross, J., held, in a considered judgment, that the defendants have no answer to this present action, and that on an application by the defendants to be indemnified by lots 47 to 51, the rights of prior incumbrancers could not prevail against them. That order has been reversed by the Court of Appeal, and if I were satisfied that the formal reversing order, or the judgment of the Court, actually decided that the jointress could not maintain the present suit, I need scarcely say I would be bound to, and would, follow that decision. Indeed, at the conclusion of the opening statement of plaintiff's counsel, I had determined, acting on what I conceived to be the decision of the Court of Appeal, to dismiss this action, but on further consideration I cannot come to the conclusion that the Court ever intended to decide that the jointress should fail in her present suit, or, if language to that effect is to be found in the judgment of

FitzGibbon, L.J., that, though entitled to every respect as coming from so distinguished a member of the Court of Appeal, it was necessary for, or is part of, the actual decision in the case. The formal order of the Court of Appeal will be found at p. 388 of [1907] 1 I. R. It contains this recital:—

> "The Court being of opinion that no money will be payable in respect of the said jointure or annuity, or any indemnity provided in respect thereof, out of any of the lands subject to the said jointure or annuity, until it is seen by the result of the sale of the estate in this matter what moneys, if any, are properly applicable to meet the said jointure or annuity and any arrears thereof, after providing for prior incumbrances";

and it then proceeds to deal with the two orders under appeal, partly discharging the order of the 18th December, 1906, and wholly reversing that of 17th May, 1907. It will be noticed that in expressing the opinion of the Court that no money will be payable in respect of the jointure or of any indemnity out of any of the lands subject to the jointure there is no direct reference to the lands which had already been sold and conveyed, so that *primâ facie* the order would not suggest that it was dealing with that part of the original estate which had passed away from the jurisdiction of the Court twenty-six to twenty-seven years ago. I think this is confirmed by the use of the word "indemnity," which would be applicable only to the indemnifying lands, and could not be referable to lands indemnified. Furthermore, the Court was dealing with an application directed only against part of the residue of the estate then under its control, and with the contention that as against this part the indemnity given to the purchasers must be puisne to the rights of unpaid incumbrancers. There was no application before the Court by the jointress, and no argument was put forward that the sold lands were not subject to the jointure, or that the incumbrancers had rights of any sort against them; and counsel for the defendants tell me at the Bar that so far as the jointress is concerned, they always entertained the clear opinion that the defendants, as owners of the sold lands, had no answer to her claim.

I, therefore, take it that the formal order of the Court of Appeal in its prefatory part went no further than expressing an

Kenny, J. (*for M.R.*) 1908.

ROWE v. GOUGH.

opinion that as against the five indemnifying lots the right of indemnity given to the purchasers was puisne to the rights of the unpaid incumbrancers, and that it did not decide that the jointress had no rights as against the sold lands. It is not probable that the Court would give a decision or express a definite opinion against the jointress in a proceeding where she was not a moving party, where, so far as the order of the 17th May, 1907, is concerned, her rights as against the sold lands were in no way affected, and where she was represented only to the extent of a "watching brief."

Does the judgment of Fitz Gibbon, L.J., extend the scope of this order? No doubt there are expressions in the judgment which have that tendency. The learned Lord Justice says he holds "it impossible that the jointress can recover, for her own use, out of any part of the estate, any money on foot of her jointure, unless or until all incumbrances prior to the jointure have been paid." But that observation alone would not preclude the jointress, as it might be applicable only to the unsold lots. He, at p. 390 of the report, says that a purchaser of the indemnifying lot would have been obliged to pay the jointure, but that the money could not go to the jointress until the prior incumbrancer was paid. But neither does that observation touch the right of the jointress as against the sold lands. But at p. 392 he adds, "I am afraid that we can only declare that no money can be paid to the jointress or recovered by her out of any lands charged with her jointure, whether sold or unsold, until the prior mortgages have been satisfied, and that nothing can be recovered out of the indemnified lots sold, until the last farthing of the capital and income of the indemnifying lands has been exhausted."

That, no doubt, is a very strong expression of opinion, and it has been relied on by the defendants as a complete answer to the present action. I cannot think that the Lord Justice meant what is attributed to him so far as the *sold* lands are concerned. But if he did mean to declare that the jointress cannot resort to the sold lands, I can only say that I think such a declaration was unnecessary for the decision of the point involved in the case before the Court, which simply was whether as against lots 47 to 51 the indemnity rights or the rights of the unpaid mortgagees were to take

priority. If so, it would be an *obiter dictum* which I would not be bound to follow. Let me also say this. Supposing the rights of the unpaid incumbrancers to be worked out through the medium of the jointress by their being allowed to stand in her shoes, it would be essential that in order to put the incumbrancers in that position, any action to be taken should be in the present form. I shall, therefore, give the plaintiff a decree. It may be that I am quite wrong in not adopting the construction of the Court of Appeal judgment in the sense relied on by the defendants; but if so, my difficulty in interpreting it is shared by Holmes, L.J., who, as appears from the report, stated he did not understand its effect or what is intended by it.

Kenny, J. (*for M.R.*) 1908.

ROWE v. GOUGH.

I shall declare the jointure well charged on the lands, and shall direct an account of what is due to the plaintiff, and I shall make no order at present with reference to the application of the Statute of Limitations. An inquiry will be directed as to charges now affecting the lands. There will be no order for either a receiver or sale, but leave will be reserved to the plaintiff to apply for either or both. The order will be without prejudice to the rights of unpaid incumbrancers in *Rowe's Estate* to receive notice of any application for a receiver or sale or allocation of any funds that may come to the credit of this action. Furthermore, there will be a stay placed on the order to enable my decision to be brought, if so desired, to the Court of Appeal.

R. W. L.

Appeal. May 12, 13, 18.

The plaintiff appealed to the Court of Appeal (1) from the order, except so far as it declared the jointure well charged on the sold lands and directed an account (2).

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ-GIBBON and HOLMES, L.JJ.

(2) The order as passed was expressed to be made without prejudice to such rights as the order of the Court of Appeal, dated the 27th June, 1907, declared to exist in favour of prior unpaid incumbrancers in the matter.

Appeal. 1908.

ROWE v. GOUGH.

Serjeant O'Connor, Ronan, K.C., and *Leech*, for the appellant.

Matheson, K.C., D. F. Browne, K.C., and *James O'Connor*, for the defendant Gough, and other purchasers of the sold and indemnified lands.

J. E. Walsh, for William Boxwell, Edward Acton Gibbon, and Mark Rochford, other purchasers of the said lands.

May 18.

FITZGIBBON, L.J. :—

This action was commenced on February 17th, 1907, by Mrs. Annette Rowe, as sole plaintiff, against the present owners of twenty-three lots of "Ebenezer Henry Rowe's Estate," which were sold and conveyed to purchasers by the Land Judges Court by conveyances dated between 27th February, 1880, and 8th August, 1884, and which have since been held under those conveyances without any claim having been made against them, until shortly before the service of the writ in this action on foot of the jointure rentcharge of £300 a year, which the plaintiff now seeks to recover with arrears. The plaintiff claims to have her jointure declared well charged on the twenty-three lots described, all of which are described as "assured by the respective deeds poll mentioned," which are the Landed Estates Court conveyances to which I have referred; and no other portions of "Ebenezer Henry Rowe's Estate," upon which the jointure is charged, are represented in this action. The last paragraph of the statement of claim is as follows:—

> "The lands subject to the said jointure rentcharge other than those comprised in the said respective deeds poll are heavily incumbered, and the rents and profits thereof have not been sufficient to discharge the interest on the incumbrances having priority over the said jointure rentcharge."

Thus the conveyances and the pleadings disclose the existence of the indemnity and of the prior incumbrances which are now in conflict with it.

Each conveyance to the defendants is expressed to be made subject to the plaintiff's jointure annuity or rentcharge, described as created by an indenture of August 16th, 1876, which was executed by her husband, Ebenezer Rowe, in exercise of a power

contained in an indenture of October 2nd, 1866. But each conveyance declares the lands to be indemnified in certain proportions against the rentcharge, and all costs and expenses occasioned by the non-payment of it, by five other lots of *Rowe's Estate* (1) which are described in the conveyances as having "been ordered to be sold by the Land Judges subject thereto."

The previous proceedings, and the circumstances which have given rise to the present litigation, are reported in [1907] 1 I. R., before Ross, J., at p. 380, and in this Court at p. 388. The only question now really open for our consideration is whether the decree for which the plaintiff prays in this action for the immediate appointment of a receiver over the lands held by the purchasers from the Land Judges Court, and for the immediate payment to her of her jointure, and the arrears upon it, out of the sold lands, would be consistent with the order of this Court made in the matter of *Rowe's Estate* (1), on 27th June, 1907, in a proceeding in which we had before us, not only the jointress and the present defendants, but also the owner and the prior incumbrancers of and on the unsold portions of the estate, which are primarily subject to the jointure and bound to indemnify the sold lands against it. We are, of course, bound not only by our own previous order, but also by any judicial opinions which we declared when making it, and I do not propose to re-open or discuss any matter so decided. But the proceedings have been complicated, and the rights of the parties have become difficult of adjustment, and it is necessary to summarize them.

The original *Rowe's Estate* (1) comprised a great number of lots, and for some years before 1884 it was treated by the Land Judges Court as being more than sufficient, not only for the discharge of all the incumbrances upon it, but also to provide an indemnity against the jointure out of the five lots mentioned in the conveyances, and which, though still unsold, have been mentioned as the "indemnifying lands."

In exercise of its jurisdiction the Land Judges Court ordered that the whole estate should be sold subject to the jointure, but that the jointure should be primarily charged on the five indemnifying lots. That order is recited in the convey-

(1) [1907] 1 I. R 388.

Appeal. 1908.

ROWE v. GOUGH.

Fitz Gibbon, L.J.

ances to the defendants, and it could only have been made upon the assumption that all the incumbrances prior to the jointure would be discharged by the sale of *Rowe's Estate* (1).

The lots now vested in the defendants, to which I refer as the sold lands, were sold on this assumption; and, if the conveyances gave to the jointress a Parliamentary title to her jointure, they also gave to the purchasers, whose money went to pay prior incumbrances, a Parliamentary guarantee of an indemnity against the lands which the conveyances described as having been ordered to be sold subject to the jointure and bound to indemnify the sold lands against it. "*Rowe's Estate*" has not yet been sold, except so far as it has been conveyed to the defendants in this action. It has been, and it still is, under the control of the Land Judges Court under a receiver, and subject to an absolute order for sale. The purchase-money paid on the sales to the defendants was applied in due priority towards payment of incumbrances, but it has left still unpaid some incumbrances prior to the jointure, on which, in the former proceeding, it was alleged that an amount exceeding what the unsold lands would produce remains due. Under these circumstances the owner first applied to Ross, J., on December 3rd, 1906, to alter the conditions of sale and to order the jointress to release her jointure on being paid compensation out of the funds in the matter. Ross, J., adjourned the motion until the present defendants, the purchasers of the indemnified lands, were brought in. This was done, and when making "no rule" on the owner's motion, Ross, J., intimated his opinion that the indemnity took priority of the incumbrances which were prior to the jointure ([1907] 1 I. R. 383). This opinion seems to have been expressed on December 18th, 1906. Thereupon, on February 17th, 1907, the jointress brought this action to raise her jointure directly from the sold lands, naming the owners of those lands, but not the prior incumbrancers on the unsold lands, as defendants.

The purchasers were thereby driven to seek their indemnity, and they applied to Ross, J. (p. 385), for an order that the receiver should pay the jointure and arrears out of the proceeds of the unsold lands.

(1) [1907] 1 I. R. 388.

The prior mortgagees, Nos. 21 to 26 on the schedule of incumbrances, to whom £20,000 principal and £11,000 interest were due, resisted the payment to the jointress (who stood on the same Schedule at No. 27) out of money which ought to go first to pay them. Ross, J., having heard counsel appearing for all parties, the purchasers of the sold lands, the prior incumbrancers, Mr. Leech of counsel for Mr. T. C. Wade, trustee of the term securing the jointure "and said Mrs. Rowe," held that the rights of the prior incumbrancers could not prevail against the indemnified purchasers, "who," he said, "had no answer to the action of the jointress"—and accordingly he ordered the receiver to pay the jointress, and so to indemnify the defendants, at the expense of the incumbrancers who were prior to the jointure. From this order the prior incumbrancers appealed, as reported in [1907] 1 I. R. 388.

It is necessary to point out that Ross, J., and this Court, in these proceedings, were dealing with the unsold lands only, and with what was still *Rowe's Estate*, but the decision affected the rights and interest of the jointress, and the liability of the purchasers of the sold lands; and these rights and liabilities were discussed, and were made the basis of arguments on each side as to the unsold lands. They appeared to the Lord Chancellor and to me to require consideration and ascertainment before we could affirm an order which, for the benefit of the jointress, gave effect to the indemnity against the sold lands at the expense of the prior incumbrancers upon the unsold lands.

Upon the question of the payment of proceeds of the unsold lands to the jointress, either directly, or for the purpose of giving effect to the indemnity, and of making that payment before the incumbrances prior to the jointure had been discharged, this Court was absolutely unanimous.

We were all of opinion that, as against the proceeds of those lands, the priority of the jointure was its priority under the settlement. Our order in *Rowe's Estate* directly affected the allocation of funds in Court arising from undistributed purchase-money on sales, or from rents and profits of unsold lands brought in by the receiver, and though the rights of the jointress as against the sold lands under the conveyance could not be decided upon the

Appeal. 1908.

ROWE v. GOUGH.

Fitz Gibbon, L.J.

occasion, it must be distinctly understood that we were all of opinion that the prior mortgagees held their priority against any claim either by the jointress directly, or by the purchasers of the sold lands claiming under their rights of indemnity against any lands or moneys under the control of the Court in *Rowe's Estate*. The only objection of Holmes, L.J., to the order which the Lord Chancellor and I proposed to make was that it gave expression to the ground of our judgment in terms which were applicable to the rights of the parties interested in the sold lands, the effect of which he said that he did not understand. The order of the Court embodied the views of the Lord Chancellor and of myself, and I endeavoured to explain the principle on which we decided the case. The order declared the opinion of the majority of the Court that no money would be *payable* in respect of the jointure, or any *indemnity* provided in respect thereof, out of *any of the lands subject to the jointure*, until it should be seen by the result of the sale of the estate in this matter (meaning thereby the whole of *Rowe's Estate*) what moneys, if any, are properly applicable to meet the jointure and arrears, *after providing for prior incumbrances.*

Accordingly the order of Ross, J., for payment of the jointure was discharged, but provision was made as to the unsold lands, with which alone we were then dealing, for keeping the funds under the control of the Court until the completion of the sale. We understand that this order has been brought on appeal to the House of Lords. If so, we suggest that our present order might well be brought there also, and considered, when all the parties interested can be heard, before the appeal against the former order has been disposed of.

But, whatever proceedings may be taken, we have in our former order declared our opinion that no decree for immediate payment on foot of the jointure should be made until the powers and obligations of the Land Judges Court to indemnify the sold lands out of the unsold lands, and also to apply the proceeds of the lands unsold, as well as the proceeds of any lands that have hitherto been sold, on the conditions as to indemnity declared by the Parliamentary conveyances, have been exercised and fulfilled in due priority.

In my former judgment I referred to some of the difficult questions of equity which may arise in certain events hereafter, upon the distribution of the purchase-money as between the prior incumbrancers and the jointress, and as against the owners of the indemnified lands; but I referred also, as I now repeat, to our opinion expressed in the former order as to all or any of the lands subject to the said jointure, and I spoke of that opinion as applying to those lands, "whether sold or unsold." I also said that when we came to the conclusion that the prior incumbrancers were entitled to be paid before the puisne jointress could get anything out of "*Rowe's Estate*," then meaning the unsold lands, it became *a fortiori* the right of the purchasers under the Landed Estates Court conveyance to be indemnified against the jointure to the last penny of what was still under the control of the Court, viz., the indemnifying lands, both capital and interest, rents and profits, and produce of sale.

The main contention of the appellant is that each Landed Estates Court conveyance is a new and distinct root of title, giving the jointress an absolute incumbrance unconditionally and immediately recoverable out of the lands conveyed, in a priority and with a security superior to that which she possessed before the sale. We, on the other hand, hold that the priority of her jointure is still governed, as against prior incumbrancers, by the terms and conditions of its original creation, which terms and conditions have not yet been performed or fulfilled by the Court; and further, that, as against the purchasers of the lands indemnified against that jointure, she cannot require immediate payment from them, so as either to defeat the indemnity altogether, or so as indirectly to throw her jointure by means of the indemnity upon the prior incumbrancers who are before her as chargeants upon *Rowe's Estate*, by compelling them, in the form of indemnity of the sold lands, to pay what this Court has already unanimously declared her to be unable to recover directly from the indemnifying lands.

The order of Kenny, J., differs somewhat in form from our order in *Rowe's Estate* (1); but in effect it does, with regard to the purchasers of the sold lands, what we did with regard

(1) [1907] 1 I. R. 388.

Appeal. 1908.

ROWE v. GOUGH.

Fitz Gibbon, L.J.

to the prior incumbrancers. Neither order will prevent the recovery of their rights by all parties, either on the completion of the sale, or in the event of our opinion being overruled by the House of Lords. There is no cross appeal against the order of Kenny, J., and we could not allow this appeal consistently with our former order, or with the opinions which the majority of the Court then expressed, and accordingly we must dismiss it with costs.

It is necessary to explain one matter appearing on our former order. On the argument of *Rowe's Estate* (1) in this Court on June 24th, 1907, Mr. Leech stated that he was instructed by Mr. Lloyd, who had been served with the notice of appeal as solicitor for Wade, the trustee of the term, but that Wade "had died," by which we understood that he had died since he had appeared by solicitor and counsel in the Court below. We further understood from him that Mrs. Rowe had not been served in the matter, though the trustee of the term was served, and that Ross, J., had held that Mrs. Rowe had no *locus standi*; that she had not been served with the notice of appeal, and that he (Mr. Leech) had only a "watching brief" in this Court. The Lord Chancellor then said that we could not hear him. But, subsequently, on June 27th, when the case was spoken to on minutes of the decree, Mr. Matheson pointed out that Mrs. Rowe, as well as her trustee, had been represented by counsel before Ross, J. Counsel is entered as appearing for her on the orders of 18th December, 1906, and of May 17th, 1907. The Lord Chancellor then said that we had not been aware of that, but that being so, we were prepared to make our order, and Mrs. Rowe was taken down upon it as appearing in this Court. We were then fully prepared to hear her counsel if he so desired. On the present appeal we have been informed that Wade, the trustee, died many years ago. If that be so, the only client who was represented by Mr. Lloyd throughout these proceedings before Ross, J., and here, has been Mrs. Rowe, whom we hold bound by our former order, and having made that order in the presence of all parties, we cannot depart from it now in a suit in which the prior incumbrancers are not represented.

(1) [1907] 1 I. R. 388.

THE LORD CHANCELLOR :—

Before my colleague reads his judgment, I desire to say that I concur in every word of the judgment of FitzGibbon, L.J., which I have had the advantage of reading. This action is founded solely upon the Landed Estates Court conveyances, and the contention of the plaintiff and appellant is based solely upon the deeds, and upon that part of each deed which declares the sold lands to be subject to the jointure; but she ignores all the rest of the deed wherein the right of indemnity is given against the unsold lands, and she is claiming a priority which she never had before the sale, and which it was never intended she should be given. In *Rowe's Estate* (1) we decided the priorities of the several parties interested; and the plaintiff is bound by that order, to which she was a party, and which is directly in conflict with her present claim. She is seeking to evade the effect of that order by pressing on, after the filing of the amended defences based upon it, a suit solely against the owners of the sold lands. I adhere to everything which I said on that occasion, when the owners of the sold lands, the jointress and the prior incumbrancers were all before us. This appeal must be dismissed with costs.

HOLMES, L.J. :—

When the appeal in *Re Rowe's Estate* (1) was heard in June last, I understood the only question for consideration to be a conflict as to a priority between an annuity of £300 charged on a portion of the lands ordered to be sold in the matter, but not actually sold, and certain incumbrances thereon of an earlier date.

In the year 1879 or 1880, the estate was divided into fifty-one lots and offered for sale subject to certain conditions, one of which was as follows :—

"The several lots of this estate are subject to a contingent jointure annuity of £300 to be payable to the wife of the owner in this matter during her life in the event of her surviving him. Each of the lots 1 to 46 inclusive in the rental will be sold subject to the entire of said annuity of £300, but indemnified against payment of any part of the same by lots 47 to 51, which will be

(1) [1907] 1 I. R. 388.

Appeal. 1908.

ROWE v. GOUGH.

Holmes, L.J.

sold by the Court primarily liable to bear the same in the proportions therein set forth."

Twenty-nine of the lots 1 to 46 were sold by public auction to several purchasers who received conveyances thereof in strict accordance with the foregoing condition, the effect of which was to free the lots so purchased from all incumbrances except the annuity which was still to be charged thereon, but indemnified against payment of any part thereof, in the proportions specified, by lots 47 to 51, which have never yet been sold.

The annuity became a vested interest in Mrs. Rowe on the death of her husband in May, 1896; but she has not since been paid anything on account of it, nor does she seem to have taken any steps to enforce payment until she issued in February, 1907, the writ in this action, the defendants in which are the present owners of the lands sold and conveyed in 1879 or 1880. The object of the suit was to have a receiver appointed over these lands for the purpose of securing payment of the arrears of the annuity and the future gales thereof as they became due; and it is evident that the defendants' advisers were of opinion that they had no answer to the action. Their attention was therefore naturally turned to the indemnity. I have said that the indemnifying lands were not sold, but they still remained subject to the jurisdiction of the Land Judge, whose receiver collected the rents which were, I assume, applied to keeping down the interest on the incumbrances prior in date to the annuity, amounting it is said to over £58,000.

It also appears that when this action was brought, the unsold portion of the estate, including the indemnifying lands, were in the process of sale to the tenants under the Irish Land Act, 1903, and as they can only be vested in the tenants discharged from the annuity, the indemnity, if these sales are carried out, will be transferred from the lands to the purchase-money, which, according to the figures given to us, will be insufficient to pay the earlier incumbrances. The defendants were thus placed in a very difficult position. On the one hand, they were advised that they had no defence to this action, while, on the other hand, the purchase-money arising from the contemplated sales might be swept away by prior incumbrancers. In this state of things an application

for relief in anticipation of the present suit was made to the Land Judge, which he thought untenable, but on the hearing of which he suggested that the unpaid incumbrancers ought not to be allowed to set up their incumbrances in priority to the annuity. This led to a further application to Mr. Justice Ross, who then made an order declaring in effect that the annuity was the first charge on the lands included in lots 47 to 51, and giving as a reason for it that the defendants have no answer to this action.

The appeal of last June was from this order; and it never occurred to me during its hearing that the Court was either asked, or had jurisdiction, to determine the rights of the annuitant against the sold lands.

Counsel for the owners of these lands sought to support the order on the grounds that there was no defence to the action pending in the Rolls Court, and that the only mode in which their clients could obtain relief against what seemed a serious grievance was that adopted by the Land Judge. They failed, however, to convince this Court that what was done in 1879 and 1880 had the effect of charging the annuity on the unsold lands in priority to incumbrances of an earlier date; and, at the end of the argument, I believed that our decision would be confined to this simple point. Even when I afterwards heard read the order which my colleagues proposed to make, I did not think that they intended by it to lay down any proposition that could affect the rights of the plaintiff in the present action; but as its terms seemed ambiguous, and as I could not say what its effect might be, I feared that the minds of others might have a similar difficulty in ascertaining what it meant. I was therefore unable to agree to it. If I had been aware that it was to be understood as it has been now interpreted, I should have dissented from it, not only on the ground that this Court had no jurisdiction to make it, but also on the ground that the order was an improper exercise of jurisdiction if such existed.

Cases of owners of lands charged with a rentcharge being indemnified against payment thereof by other lands have been common in Ireland since the passing of the Landed Estates Court Act; but I have never heard that the existence of such an indemnity could be used to delay proceedings to raise the charge out of the

Appeal. 1908. ROWE v. GOUGH. Holmes, L.J.

lands indemnified, and I believe that an order having this effect would be contrary to legal principle.

Furthermore, if this matter had been present to my mind in June last, I am sure I would have thought then, as I do now, that to stay this action, while causing the annuitant great hardship, would not ultimately benefit the defendants, who, if not entitled to relief in the mode proposed by Mr. Justice Ross, as we all thought they were not, are left with a worthless indemnity. Of course I am now bound by the decision given in the former appeal, as it is interpreted by my colleagues; and I concur in the present judgment of the Court. I have, however, taken this opportunity of saying what I would have said in June last if I had understood the true meaning of the order then made.

There has been some controversy as to whether the annuitant had notice of the former appeal; but I regard this as immaterial.

Counsel on her behalf held a watching brief; but as she had the same interest in upholding the order of the Land Judge as the respondents, I was not surprised that he did not seek to intervene in the discussion. His client, however, must I think be assumed to have had notice, and is bound by what was then done.

Solicitor for the plaintiff: *Clifford Lloyd.*

Solicitors for the defendants Gough and others: *P. J. O'Flaherty & Sons.*

Solicitors for the defendants Boxwell, Gibbon, and Rochford: *Little & Elgee.*

Solicitor for the defendant Martha Bolger: *John Sinnott.*

IN THE MATTER OF THE ESTATE OF THE MOST NOBLE THE MARQUESS OF CLANRICARDE.

Wylie, J. 1908.

Feb. 5, 11, 25.

Appeal.

May 8, 11, 18.

Evicted tenants—Compulsory acquisition of land—Bona fide *tenant—Consent of tenant to acquisition of his tenancy—Waiver of prohibition.*

C., a tenant in occupation of a holding formerly held by a tenant who had been evicted, presented a request to the Estates Commissioners, asking them to acquire from his landlord the lands of which he was then tenant, and agreeing to sign any document which might be necessary for the transfer of the tenant's interest to the Estates Commissioners. C. was a *bona fide* tenant, cultivating his land as an ordinary farmer, in accordance with proper methods of husbandry, within the proviso in sub-section 3 of section 1 of the Evicted Tenants (Ireland) Act, 1907.

On the hearing of a memorandum, submitting questions of law for the decision of the Judicial Commissioner:—

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that the prohibition against the compulsory acquisition of land by the Estates Commissioners, contained in sub-section 3 of section 2 of the Act, could not be waived by the consent of the tenant alone, and that the Estates Commissioners were debarred from acquiring the land comprised in C.'s holding under the provisions of the Evicted Tenants (Ireland) Act, 1907.

QUESTIONS OF LAW submitted by the Estates Commissioners for the decision of Wylie, J.

The memorandum of the Estates Commissioners was as follows:—

Part of the lands of Cappasallagh, the subject-matter of the notice hereinafter referred to, were, at the date of the said notice, and still are, occupied by George Cottingham as tenant to the said Marquess of Clanricarde, and he was, at the date of signing the document hereinafter referred to, a *bona fide* tenant using or cultivating the said lands as an ordinary farmer, in accordance with proper methods of husbandry. The said lands were formerly occupied by an evicted tenant or tenants to whom the above-mentioned Act (1) applies.

(1) Evicted Tenants (Ireland) Act, 1907.

Wylie, J.
1908.

In re CLANRICARDE'S ESTATE.

On the 14th November, 1907, the said George Cottingham signed a document in the following terms:—

> "I request the Estates Commissioners to take steps, under the Evicted Tenants (Ireland) Act, 1907, to acquire from Lord Clanricarde the lands of which I am at present the tenant; and if they do so I am willing to accept the sum of two hundred and twenty pounds for the purchase of the tenant's interest in the said lands, and to sign any deeds or other documents which may be necessary for the extinguishment or transfer of the said tenant's interest to the Estates Commissioners, or such person or persons as they may direct. All arrears of rent and apportioned rent up to the date of my giving up possession, and all mortgages or charges, to be paid or retained out of the said sum. Any required investigation of my title to be made by and at the expense of the Land Commission, and I undertake to give all necessary assistance in such investigation."

The Estates Commissioners are prepared to pay the said sum of £220 to the said George Cottingham if legally entitled to do so.

The Estates Commissioners consider it expedient to acquire the said lands for the purposes of the Evicted Tenants (Ireland) Act, and they propose to restore thereto tenants evicted from the estate; but they have not determined up to the present whether, if the lands are acquired, it is possible or expedient to reinstate in the said lands the actual tenant or tenants evicted therefrom.

The Estates Commissioners published in the *Dublin Gazette* a notice of their intention to acquire (amongst others) the said lands compulsorily under the above-mentioned Act, calling upon the Marquess of Clanricarde, who appeared to the Estates Commissioners to be owner of the said lands, and all other persons, if any, interested in the said lands, who might object to the acquisition of the said lands under the said Act, to lodge in the office of the Irish Land Commission, within one month from the date of the publication in the *Dublin Gazette* of the said notice, a statement of the grounds of their objection. Amongst the lands mentioned in the schedule to the said notice were the lands of Cappasallagh included in the tenancy of the said George Cottingham.

On the 21st December, 1907, the Marquess of Clanricarde duly

lodged an objection to the acquisition of the said lands for a number of reasons, of which the following are two :—

"That the lands are tenanted lands, and in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer in accordance with the proper methods of husbandry."

"That the lands are tenanted lands, and that it is proposed that persons other than the evicted tenants thereof should be placed in possession of same as purchasers thereof."

Upon that statement of facts the Estates Commissioners referred the following questions of law :—

1. Are the Estates Commissioners debarred from acquiring the said lands under the provisions of the Evicted Tenants Act, on the ground that the lands are tenanted lands and in the possession or occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer in accordance with the proper methods of husbandry ?

2. Can the Estates Commissioners only acquire the said lands compulsorily for the purpose of reinstating the actual tenant or tenants formerly evicted therefrom ?

3. If the Estates Commissioners are not debarred from acquiring the said lands, and do acquire them, are they entitled to pay the said sum of £220 out of the Reserve Fund ?

Serjeant O'Connor, K.C., A. C. Meredith, K.C., and *W. E. Wylie*, for the Estates Commissioners.

Jellett, K.C., and *J. W. Hynes*, for the Marquess of Clanricarde.

Ronan, K.C., and *Muldoon*, for Cottingham and evicted tenants.

[The arguments were substantially the same as reported in the subsequent hearing in the Court of Appeal, *infra*, p. 434.]

WYLIE, J. :—

Feb. 25.

In this case the Estates Commissioners have, under sect. 23 of the Act of 1903, submitted for my decision three questions of law arising upon the construction of certain provisions of the Evicted Tenants (Ireland) Act, 1907. [His Lordship, having stated the facts, as set out in the memorandum, proceeded :]

Wylie, J. 1908. *In re* CLANRICARDE'S ESTATE.

The first and second questions arise upon the construction of sub-sect. 3 of sect. 1 of the Evicted Tenants (Ireland) Act, 1907. That Act is plainly supplemental to the provisions of the prior Land Purchase Acts dealing with the same subject-matter, and, by sect. 20, must be construed as one with those Acts.

In endeavouring, therefore, to ascertain its purpose and effect, it will be necessary for me to refer to those earlier enactments, to see what was the aim and purpose of the Legislature as disclosed therein, and to discover wherein they failed.

The earliest enactment passed for the special benefit of these evicted tenants is embodied in sect. 13 of the Land Purchase (Ireland) Act of 1891. That section enacted that "where the tenancy of a holding had determined after the 1st May, 1879, and the former landlord or his successor in title was in occupation of the holding, it should be lawful for the former landlord or his successor in title, within six months from the passing of the Act, to enter into an agreement under the Land Purchase Acts, for the sale of the holding to the former tenant or his personal representatives." Now, the purpose of that provision was the reinstatement of these evicted tenants in their former holdings, but, according to its terms, two conditions were necessary to make it effective—(1) the owner must consent, and (2) the owner must be in occupation of the holding. It could not therefore be applied to any holding in the occupation of a "new tenant," as defined by the Act of 1907, unless he also consented and gave up possession.

That section was re-enacted for a period of six months in 1895, and was again re-enacted for a further period of twelve months by the Land Purchase Act, 1896, Part V. The latter Act also made provision, by sect. 47, for the reinstatement of these evicted tenants by an order of the Land Commission, but that, too, was dependent upon the consent of both the owner and the evicted tenant. The powers conferred by that section were not in terms limited to holdings in the owner's occupation, and, therefore, an order made under it might have dispossessed any tenant. A subsection was accordingly inserted in the following terms:—"An order under this section shall not be made in the case of a holding which on January 1st 1896, was in the occupation of a tenant."

Now, though that sub-section is in form absolutely prohibitory in any case in which the holding was in the occupation of a tenant on the date mentioned, it is plain that its only object was to protect the possession of such tenant; and if such a tenant, after January 1st, 1896, and either prior to or after the passing of the Act of 1896 had given up or agreed to give up possession to the landlord, in order to enable him to reinstate the evicted tenant, could it be contended that, upon a joint application by the landlord and evicted tenant, under sect. 47 of that Act, the Land Commission could not have made an order for reinstatement? In other words, could the new tenant, for whose benefit and protection alone sub-sect. 6 was intended, not waive his right under it by giving up possession? In my opinion he could.

Under that Act also, however, even if the tenant gave up possession, the reinstatement of the evicted tenant was dependent on the consent of the owner.

The next attempt made by Parliament to provide for these evicted tenants was by sect. 2 of the Act of 1903. That section provided that in case of the sale of an estate advances might be made for the purchase of parcels of land by (amongst others) these evicted tenants, and by the other provisions of that Act the Land Commission were given ample powers to buy untenanted lands sufficient to provide holdings for all these evicted tenants, but they could only obtain it through voluntary agreements with the owners and they had no power to disturb any occupying tenant or to provide a holding for him if he gave up possession.

Consequently, that Act also failed to attain the object aimed at by Parliament, as plainly expressed in all these Acts, viz., the reinstatement of these evicted tenants in their former holdings or in other holdings which they would be willing to accept.

In that state of things the Evicted Tenants (Ireland) Act, 1907, was passed. It is, by its title, "an Act to facilitate the provision of land for certain evicted tenants," and is, as I have said, plainly supplemental to the provisions of the prior Acts passed with the same object, and was intended to effect that object by conferring on the Estates Commissioners such compulsory powers as would enable them to attain it despite the unwillingness of the owners to sell, and of the new tenants to

Wylie, J. 1908.

In re CLANRICARDE'S ESTATE.

give up possession, subject, however, to such restrictions as are in the Act provided. Sect. 1, sub-sect. 1, accordingly, enacts that "if it appears to the Estates Commissioners that it is expedient to acquire any land for the purposes of this Act, and if they have offered to the person appearing to them to be the owner of the land a price which appears to them to represent the value thereof, and he has not within the prescribed time accepted the offer, they may, subject to the provisions as to appeal contained in this Act acquire that land compulsorily for those purposes."

That sub-section seems to me to confer on the Estates Commissioners a general power, subject to appeal, to acquire any land tenanted or untenanted for the purposes of the Act, without the consent of any person, be he owner, tenant, or otherwise interested.

The "purposes of the Act" are defined by sub-sect. 2 to mean "the provision of parcels of land (*a*) for evicted tenants to whom the Act applies," who are clearly defined in the sub-section, and (*b*) for "new tenants to whom the Act applies"—also clearly defined—as tenants of holdings formerly occupied by the said evicted tenants.

So far, therefore, I think it is plain that the Act contemplated the removal by the Estates Commissioners under their compulsory powers of those "new tenants" from the holdings formerly occupied by the evicted tenants, the re-instatement of the evicted tenants therein, and the provision of other parcels of land for such new tenants where removed, or the payment of money compensation in lieu thereof as afterwards provided.

The scheme as set forth in the Act, by which the purposes of the Act are to be carried out, is plainly this—By sect. 1, sub-sect. 1, a general power is conferred on the Estates Commissioners to acquire compulsorily *any* land wherever they think it expedient for the purposes of the Act—a power which would enable them to expropriate and dispossess any and every owner and occupier. Then by subsequent provisions protection is provided for owners and occupiers against the exercise of that compulsory power in cases in which the Legislature thought it should not be applied. Now, it was obviously unnecessary, in order to carry out the purposes of the Act, to disturb any tenant who was not in occupation of an evicted holding, and, accordingly, sub-sect. 3 provides that "no

tenanted land shall be acquired compulsorily unless it is in the occupation of a new tenant," *i.e.*, a tenant in the occupation of an evicted holding. So far the sub-section absolutely protects every tenant, except a new tenant, from disturbance; but if the sub-section had ended there, it seems to me clear that the Estates Commissioners would have had power to acquire compulsorily any land in the occupation of "a new tenant." So far every new tenant would have been liable to removal if the Estates Commissioners thought it expedient to acquire the land for the purposes of the Act. But it evidently occurred to the Legislature that it would be unjust and unfair to remove a "new tenant" for the purpose of putting into the holding another person who had no previous connexion with that holding; and, accordingly, sub-sect. 3 goes on to provide that no tenanted land in the occupation of a new tenant shall be acquired compulsorily, "unless the Estates Commissioners, having regard to all the circumstances of the case, holding, and district, and to the cost involved, consider it expedient that the evicted tenant should be re-instated as a purchaser of that land." Now, the answer to the second question submitted to me depends upon the true construction of that clause in sub-sect. 3. It was argued by counsel for the Estates Commissioners, and for the evicted tenants, that it would be open to the Estates Commissioners to remove a "new tenant" from his holding in order to put into it *any* of the evicted tenants to whom the Act applies; but it seems to me the words used are too clear and specific to permit of that construction. In my opinion, the words "the evicted tenant" mean the particular tenant formerly evicted out of the particular holding. You cannot, I think, properly speaking, *reinstate* a tenant in a holding of which he was not previously tenant, and I think the matter is placed beyond doubt by reference to similar words in sect. 3.

In my opinion, therefore, the Estates Commissioners cannot compulsorily dispossess *any* new tenant, except for the purpose of reinstating the tenant formerly evicted from the holding, or his personal representative.

I, accordingly, answer the second question in the affirmative.

This brings me to the last clause in sub-sect. 3, on which the answer to the first question submitted to me turns. It is in these

Wylie, J. 1908.

In re CLANRICARDE'S ESTATE.

terms—"Provided [that no tenanted land shall be acquired compulsorily which is in the possession or occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry." That means of course, a *bona fide* "*new tenant*," because no tenant, except a new tenant, could be removed at all.

Now, the contention on behalf of Lord Clanricarde is, that the proviso absolutely prohibits the compulsory acquisition of land which is in the occupation of, what I may shortly call, a "*bona fide* new tenant." That, in fact, it was intended to protect the owner, in such a case, from compulsory expropriation, as well as the new tenant from disturbance; and, in order to support this view, it was contended that the words "acquire any land" throughout the Act mean "acquire the *owner's* interest in the land." Now, it seems to me impossible to hold that the words "acquire any land" in sub-sect. 1 can have such a limited meaning, because the Estates Commissioners are to acquire the land for the purposes of the Act, and there can, I think, be no doubt, having regard to previous legislation dealing with evicted tenants, and to the terms of sub-sect. 2, that the primary purpose of this Act was to reinstate evicted tenants in their former holdings, and this could not be carried out unless the power to "acquire any land" given by sub-sect. 1 extended to the interest both of owner and occupier.

As against this view I was referred to sect. 4 of the Act; but that section seems to me to be in favour of, rather than against, my view, because it merely prescribes the mode by which the Estates Commissioners are to get rid of the new tenant after they have acquired the land.

Assuming, however, this view to be correct, it is still contended that the proviso to sub-sect. 3 absolutely prohibits the Estates Commissioners from acquiring the land compulsorily where it is in the occupation of a "*bona fide* new tenant," as described in the proviso. Now the proviso is, no doubt, in form absolute, but not more absolute than sub-sect. 6 of sect. 47 of the Act of 1896, which was passed for a precisely similar purpose, and was clearly intended only to protect the tenant, conferring upon him a benefit or a right which, as I have said, in my opinion, he could waive.

Now, suppose those "*bona fide* new tenants" were all to

abandon these holdings and give up possession, relying upon the Estates Commissioners to give them due compensation under the Act, what would be the result? The proviso would cease to apply, the holdings would no longer be in the possession or occupation of a "*bona fide* new tenant," and the land could be acquired compulsorily as against the owner. Is there anything in the Act, or in law, to prevent these new tenants from taking the course I have indicated, if they thought fit, either in their own interest, or to assist in carrying out the policy and purpose of the Act? Was this proviso inserted for the purpose of preventing these "*bona fide* new tenants" from giving up their holdings in order to protect the owner against the compulsory power of the Estates Commissioners to acquire the land as untenanted land? This proviso is not so prohibitive in form as sub-sect. 6 of sect. 47 of the Act of 1896, to which I have referred. It does not say that no tenanted land in the occupation of a "*bona fide* new tenant" on May 1st, 1907, or other antecedent date, shall be acquired compulsorily. If it had been in that form, there might, perhaps, have been some foundation for an argument that it was designed to protect the owner as well as the tenant. If the Legislature has left these "*bona fide* new tenants" free to give up their holdings voluntarily, as, in my opinion, it has, I cannot conceive on what reasonable ground it can be suggested that Parliament intended, by this proviso, to protect the owner in such cases, and thereby frustrate in a great measure the very purpose of the Act, where it has, by the other provisions of the Act, given the Estates Commissioners full power to acquire compulsorily, not only the owner's untenanted land, but also all the land in the occupation of his other new tenants whose continued occupation might be in many cases even more desirable and more profitable to the owner than that of the class included in the proviso.

I think some light is also thrown on the meaning of sub-sect. 3 by sub-sects. 4 and 5. Sub-sect. 4 gives protection to any tenant-purchaser under the Land Purchase Acts, but sub-sect. 5 then prevents a new tenant from evading the compulsory provisions of the Act by purchasing his holding in anticipation of the passing of the Act by an agreement made after May 1st, 1907, and, notwithstanding such an agreement, he is still to be deemed a

Wylie, J. 1908. *In re* CLANRICARDE'S ESTATE.

tenant for the purposes of the Act, and subject to removal or protection, as the case may be, under sub-sect. 3.

Having thus provided protection, in certain cases, for tenants and tenant purchasers, the Legislature, by sect. 7, provides protection for an owner of untenanted land against the compulsory powers of the Estates Commissioners in a number of cases therein specified, in which it would be manifestly unreasonable and unjust to put them in force. This is the only section, in my opinion, by which the Legislature intended to throw any protection around an owner, as distinguished from a tenant-purchaser, or tenant, and where land is tenanted the policy of all the Purchase Acts is to abolish dual ownership by buying out the landlord.

Having thus endeavoured, as best I could, from a consideration of the provisions of this Act and of the prior Acts to be construed with it, to ascertain the intention of the Legislature, as expressed in the proviso to sub-sect. 3, I have arrived at the conclusion that the *sole* object of the Legislature, in inserting that proviso, was to protect the "*bona fide* new tenant," therein described, from *compulsory* removal; and that where such a new tenant has signed a document, such as that set out in the memorandum, requesting the Estates Commissioners to acquire the land under the Act, that proviso has fulfilled its purpose, and is no longer operative, and there is nothing else in the Act to debar the Estates Commissioners from acquiring that land.

In arriving at this conclusion, I was, of course, not at liberty to take into consideration anything that was said in either House of Parliament while the Act was passing through; but during the argument, counsel for Lord Clanricarde strongly contended that to construe the proviso as I have done would frustrate the policy and intention of Parliament in enacting that proviso, which they allege was to maintain and perpetuate the occupation of all these *bona fide* tenants. Now, having had some recollection of what had passed in Parliament, I took the trouble of reading in Hansard some of the speeches in support of this proviso, and I do not think that it will be found that, in any of these speeches it was ever suggested by any one that the proviso had any other object than to protect these *bona fide* planter tenants from removal against their will. On August

28th, 1907, in the final debate in the House of Lords, Lord Lansdowne, speaking of the object and effect of this proviso and of the different classes of "new tenants," said—"The caretakers, the nondescripts, the birds of passage, will not be protected. Then there are others of these planter tenants who no doubt will be *perfectly willing to remove elsewhere* under the liberal inducements that are to be offered to them. *Those men are willing to go*, and need not be considered. What then remains? Only that residuum—that handful of courageous men who are farming their land properly, who have their farms stocked, who are paying their rents, and *who wish to remain where they are.*" Such was the expressed object of the supporters of the enactment. But, as I have said, in construing the Act, I cannot pay any regard to such expressed intentions, nor have I done so.

Of course I am sensible of the difficulty of freeing the mind from the unconscious influence of knowledge which ought not to be allowed to affect it, and I have endeavoured with the utmost care to guard against any such influence; but, whether my decision is right or wrong, it is a satisfaction to me to know that the opinion I have formed is in harmony with the views of those at whose instance this proviso was inserted, and that, if wrong, it can be set right by a higher Court. My answer, therefore, to the first question is in the negative. I have already answered the second question; but that answer must be taken in conjunction with my answer to the first, so that in any case in which a new tenant removes voluntarily the second question does not arise. My answer will, accordingly, be "Yes, unless the said George Cottingham gives up the lands voluntarily." As to the third question there seems to me to be no difficulty, and I answer the question, as amended, in the affirmative.

J. E. W.

Appeal. 1908.

In re CLANRICARDE'S ESTATE.

May 8, 11, 18.

The Marquess of Clanricarde appealed (1).

Jellett, K.C. (with him *Hynes*), for the appellant :—

Section 1 of the Evicted Tenants (Ir.) Act, 1907, relates to the acquisition of the landlord's interest, and the prohibition in the proviso in sub-sect. 3 of sect. 1 cannot be waived by any act on the part of the tenant. Wylie, J., assumed that this proviso was introduced solely for the benefit of tenants coming within the description in the proviso, but we contend that that is not so : the landlord is interested in the retention of a *bona fide* tenant properly cultivating the land, and the State has also an interest in the matter, as it provides the money for the compulsory acquisition of the land. The object of the Act is to increase the amount of the tenanted land in Ireland; and the object would not be furthered by the ousting of a *bona fide* tenant to make room for the former tenant who had been evicted. The principle that people may contract themselves out of rights given them by statute only applies to cases where the statute "deals merely with procedure, or gives a private right which may be renounced," and is not applicable as against a specific mandatory or declaratory enactment : Hardcastle (1907 ed.), p. 74 ; *Netherseal Colliery Co.* v. *Bourne* (2).

A. C. Meredith, K.C. (with him *Serjeant O'Connor, K.C.*, and *W. E. Wylie*), for the Estates Commissioners :—

The proviso in sub-sect. 3 characterizes, not the lands, but the class of tenants mentioned in whose favour it was enacted ; and "compulsorily," in that proviso, must be read as meaning "without the consent of the tenant." It is necesary "to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy" : *per* Lord Halsbury in *Eastman Photographic Materials Company* v. *Comptroller General of Patents, Designs, and Trade Marks* (3). The object of

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) 14 App. Cas. 228.

(3) [1898] A. C. 571, at p. 573.

the Act was to provide land for the restoration of evicted tenants, and it could never have been intended to restrict the Estates Commissioners from acquiring land in the occupation of "new tenants" who were *bona fide* tenants if they were willing to consent to such acquisition; such a construction would reduce the Act to a nullity. The scheme of the Act is to enable the Estates Commissioners to acquire land from the landlord, voluntarily, if possible; if not, compulsorily. Acquisition *in invitum* the landlord is deemed a voluntary agreement by him to sell under the Land Purchase Acts (sect. 15); but there can be no such constructive agreement without the consent of his tenants in cases within sect. 1 (3), (4), nor without his own waiver in cases within sect. 7. The previous legislation as to these matters, especially sub-sect. 6 of sect. 47 of the Act of 1896, shows that the view suggested is correct.

H. Wilson, K.C. (with him *Muldoon*), for certain evicted tenants.

May 18.

THE LORD CHANCELLOR:—

This is an appeal from a decision of Mr. Justice Wylie upon three questions of law referred to him as Judicial Commissioner by the Estates Commissioners.

The question raised involves the true construction of the Evicted Tenants Act of 1907, as applied to certain facts stated in the memorandum submitted to him.

The Marquess of Clanricarde is the owner in fee of certain lands in the county of Galway, which are proposed to be acquired compulsorily by the Estates Commissioners under the Evicted Tenants Act, 1907, for the purposes of that Act.

The Estates Commissioners published a notice in the *Dublin Gazette* of the 3rd December, 1907, entitled in the matter of Evicted Tenants (Ir.) Act, 1907, and the estate of the Most Noble the Marquess of Clanricarde, which so far as material to this case is in the following terms:—"Take notice, that the Estates Commissioners propose to acquire compulsorily under the above-mentioned Act the lands particularly mentioned in the schedule hereto; and further take notice that the Estates Commissioners hereby call upon the persons mentioned at the foot of

Appeal. 1908.

In re CLANRICARDE'S ESTATE.

The Lord Chancellor.

this notice, and all other persons, if any, interested in the said lands, who may object to the acquisition of the said lands under the said Act, to lodge in the office of the Irish Land Commission, within one month from the date of the publication in the *Dublin Gazette* of this notice, a statement of the grounds of their objection."

This schedule includes forty denominations of lands, of which some are described as in the rated occupation of the Marquess of Clanricarde, and the remainder in the rated occupation of other persons, and the particular portion to which the question relates is described as follows :—" Part of the lands of Cappasallagh, situate in the barony of Longford and county of Galway, containing in or about 49A. 1R. 23P., statute measure, and bounded on the north by other part of Cappasallagh; on the south by other part of the lands of Cappasallagh; on the east by other part of Cappasallagh; and on the west by other part of the lands of Cappasallagh, and at present in the rated occupation of George Cottingham."

The memorandum states that these lands were, at the date of the said notice, and still are, occupied by George Cottingham as tenant to the said Marquess of Clanricarde, and he was, at the date of signing the document hereinafter referred to, a *bona fide* tenant, using or cultivating the said lands as an ordinary farmer in accordance with proper methods of husbandry. The lands were formerly occupied by an evicted tenant or tenants, to whom the Act applies.

Prior to the publication of the notice in the *Dublin Gazette*, viz., on the 14th November, 1907, this George Cottingham signed the following document, which he lodged with the Estates Commissioners :—" I request the Estates Commissioners to take steps under the Evicted Tenants (Ireland) Act, 1907, to acquire from Lord Clanricarde the lands of which I am at present the tenant, and if they do so, I am willing to accept the sum of £220 for the purchase of the tenant's interest in the said lands, and to sign any deeds or other documents, which may be necessary for the extinguishment of, or transfer of, the said tenant's interest to the Estates Commissioners, or such person or persons as they may direct. All arrears of rent and apportionment up to the date of my giving up possession, and all mortgages or charges,

to be paid or retained out of the said sum. Any required investigation of my title to be made by and at the expense of the Land Commission, and I undertake to give all necessary assistance in such investigation."

The object and expressed intention is to acquire compulsorily from Lord Clanricarde the lands in Cottingham's tenancy, and to accomplish that completely by purchasing from Cottingham his interest as tenant, for which purpose Cottingham is to sign any deed or document which may be necessary for the extinguishment of, or transfer of, his interest to the Estates Commissioners, or to such person or persons as they may direct.

Lord Clanricarde lodged an objection to the acquisition of the lands for, amongst other reasons:—"That the lands are tenanted lands, and in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer, with proper methods of husbandry. That the lands are tenanted lands, and that it is proposed that persons other than evicted tenants thereof should be placed in possession of same as purchasers thereof."

The Estates Commissioners are prepared to pay this sum of £220 to George Cottingham, if legally entitled to do so, and the memorandum contains the following statement:—"The Estates Commissioners consider it expedient to acquire the said lands for the purposes of the Evicted Tenants (Ireland) Act, and they propose to restore thereto tenants evicted from the estate, but they have not determined up to the present whether, if the lands are acquired, it is possible or expedient to reinstate in the said lands the actual tenant or tenants evicted therefrom.

The Estates Commissioners referred to the Judicial Commissioner the three following questions:—(1) "Are the Estates Commissioners debarred from acquiring the said lands under the provisions of the Evicted Tenants Act, on the ground that the lands are tenanted lands, and in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry? (2) Can the Estates Commissioners only acquire the said lands compulsorily for the purpose of reinstating the actual tenant or tenants formerly evicted therefrom? (3) If the Estates Commissioners are not debarred from acquiring the said lands, are

Appeal. 1908.

In re CLANRICARDE'S ESTATE.

The Lord Chancellor.

they entitled to pay the said sum of £220 out of the reserve fund?"

It is stated, and would seem to be the fact, that there are other lands similarly situated to those involved in the present case, and the Estates Commissioners require guidance as to their powers of acquiring them compulsorily under the Act—a most natural object of theirs, having regard to their position under the Act; and, as we were rightly told, they have no other object but this. The question wholly depends on the construction of the Evicted Tenants Act; and, for the purpose of applying it, it may be taken that Cottingham is a new tenant to whom the Act applies, and that his (Cottingham's) lands are in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer, in accordance with the proper methods of husbandry.

Section 1 of the Act enables the Estates Commissioners, after complying with certain conditions, to acquire lands compulsorily for the purposes of the Act; and purposes of the Act mean the provision of parcels of land for (*a*) evicted tenants coming within certain descriptions, and (*b*) new tenants as defined. Of course, where there are new tenants in occupation, the land is "tenanted land," and sub-sect. 3 of sect. 1 attaches three prohibitions to the acquisition of "tenanted land" compulsorily. The first is that no tenanted land shall be acquired compulsorily, unless it is in the occupation of a new tenant to whom the Act applies. This is a prohibition attaching to the subject, and it seems to me it would be impossible, if the land were in the tenancy of an old tenant, that he should be got rid of by any consent or waiver on the part of such old tenant. The second is, "and unless the Estates Commissioners, having regard to all the circumstances of the case, holding, and district, and to the cost involved, consider it expedient that the evicted tenant should be reinstated as a purchaser." This is an absolute prohibition on acquisition by the Estates Commissioners unless the conditions exist, and the third is contained in the proviso —"Provided that no tenanted land shall be acquired compulsorily which is in the possession or occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry." It is part of the case that such a circumstance exists here, and the only way in which the prohibition

is sought to be got rid of is that the tenant is willing not to raise the question and sell his holding to the Estates Commissioners; but this does not get rid of the prohibition attaching to the subject-matter. It must still be acquired compulsorily against Lord Clanricarde, and it is a matter in which both he and the State which pays the money have a sufficient interest to put forward the prohibition. Sub-sect. 4 is also an absolute prohibition —"No land shall be acquired compulsorily which is subject to an annuity for the repayment of an advance." This again attaches on the subject. I do not see how Lord Clanricarde can cease to be the owner, save by the lands being acquired compulsorily under the terms of the Act.

It is quite true that sub-sect. 3 of sect. 1 has much narrowed the operation of the statute, and in result limits the acquisition of "tenanted land" to a possibly small class of occupiers to be operated on by the provisions of sect. 4; but if the Act as it has come upon the Statute Book has done this, we are bound to follow it. We have, of course, no right to consider where or how, or supported by what speeches, the Act came to assume its present shape, though I may have a suspicion that the construction I feel forced to give it goes farther than what was intended apart from the language used.

I was for some time impressed with the idea that the contract of Cottingham was pointed to a result to be arrived at before the vesting order against Lord Clanricarde came into operation, and so the land would be then untenanted; but that is a construction of the document difficult to adopt, and which would not find favour with my colleagues; and the counsel for both the Estates Commissioners and the tenants have been unwilling to accept this idea tentatively put forward by me.

In result we are bound to answer the first question in the affirmative; and having regard to our answer to the first question, answers to questions 2 and 3 become unnecessary.

Appeal. 1908.

In re CLANRICARDE'S ESTATE.

FITZGIBBON, L.J.:—

As we answer the first question in the affirmative, thereby declaring that the Estates Commissioners are debarred from acquiring the lands referred to in the memorandum under the provisions of the Evicted Tenants Act, on the ground stated in the question, the second question, which asks whether the Estates Commissioners can only acquire those lands for the particular purpose of reinstating the former tenant, and the third question which is only put . . . "if the Estates Commissioners are not debarred from acquiring the said lands," are completely disposed of by our categorical answer to the first question.

The object of the Evicted Tenants Act is to give to the Estates Commissioners new powers of acquiring land compulsorily by means of which to bring "evicted tenants" within the provisions of the Land Purchase Acts, either by reinstating them as purchasers of the land formerly held by them, or by acquiring other lands of which to give them possession when acquired for that purpose. This Act deals only with compulsory powers, and the present memorandum does not refer to any powers which the Estates Commissioners may have of acquiring land otherwise than by compulsion.

The compulsory power that is to be exercised is one to acquire "*land*"—the freehold and inheritance of land—on which evicted tenants can be placed as occupiers; and land is divided by the statute into two classes—(*a*) "tenanted land," and (*b*) "untenanted land." In untenanted land there is but one estate or interest—that of the land-owner—intervening between the Estates Commissioners and the power of placing new persons in occupation; that class of land is dealt with by sect. 7, which puts certain restrictions on acquiring it compulsorily; and certain provisions are made for dealing with "untenanted land" when so taken. But with "untenanted land" neither the memorandum nor we have anything now to do.

The power of compulsorily acquiring "tenanted land" must, for our purpose, be found within sect. 1, sub-sect. 3. That subsection consists of three parts, of which the first is a general prohibition. "*No tenanted land shall be acquired compulsorily*"; the second is an exception; "*unless it is in the occupation of a new*

tenant to whom this Act applies," and the Estates Commissioners think it expedient to reinstate the evicted tenant as a purchaser of *that land.* Thirdly, there is an exclusion from the exception—"*No tenanted land shall be acquired compulsorily which is in the possession or occupation of a bona fide tenant using or cultivating the same as an ordinary farmer in accordance with proper methods of husbandry.*"

One *genus* of land, "untenanted land," is dealt with by another section; the other *genus*, "tenanted land," is divided into two *species*—viz.: (1) Land in the possession of old tenants, which is altogether outside the compulsory power; and (2) Land in the possession of new tenants; this land is divided into two classes—viz.: (1) Land in the possession of new tenants who are honestly holding and using it as ordinary farmers, and cultivating it in a husbandlike manner; and (2) land in the possession of new tenants who do not answer this description. Any one who knows anything about the history or condition of the country, knows, unfortunately, that the second class is by no means small.

It was suggested that this exception left nothing for the Act to operate upon. That is not so; all tenants are not ordinary farmers, or husbandlike men; and "new tenants" are often under special difficulties and disadvantages. Some of them may not be even "*bona fide*" tenants; we have sometimes heard, for example, of bailiffs and of "emergency men." But this is not the only instance of special legislation in favour of ordinary farmers; they are given a preference in the provisions as to town parks in the Act of 1887, sect. 9, and in the Act of 1896, sect. 6.

The object of the Act of 1907 is to enlarge the area of land held by tenant-purchasers, presumably and preferably *bona fide* tenants, using their land as ordinary farmers and in the course of good husbandry.

If any tenant satisfies that description, what is the object or policy of turning him out to make room for anybody else, whether it is done "compulsorily" or by buying him out at his own price? If no "old tenant," good or bad, can be turned out, why should any *good* new tenant be turned out? If any old tenant were put out, or if his holding were acquired in order to put in another

Appeal. 1908.

In re CLANRICARDE'S ESTATE.

Fitz Gibbon, L.J.

tenant, the number of "evicted tenants" would not be diminished, and the area of tenanted land would not be increased, and the public money would be spent without advantage; accordingly "no tenanted land shall be acquired compulsorily" from old tenants. Then take the excepted class of new tenants, those who are ordinary farmers and husbandlike men; is one of them to be put out to put an "evicted tenant" into his place, merely in the hope that he will do as well as the man whom he replaces? I hold the policy of the Act to be that land may be acquired for the purpose of extending the area of the tenanted land in Ireland by providing evicted tenants with holdings on which they may get the chance of succeeding as farmers, but that this must not be done by compulsorily taking land from tenants of the very class which it is hoped to enlarge by the operation of the Act.

It was argued that this provision was only for the protection of occupiers, and that, therefore, it could be waived by them. But in the first place the land to be acquired must be acquired right out; all interests, including the occupation interest, must be acquired before the evicted tenant can be restored; and the express provisions by which any new tenants who are displaced are to be compensated are part of the process of compulsion; they, as well as their landlords, are obliged to accept terms which are presumed to be just, but these are the only terms on which the occupation interest can be acquired in tenanted land compulsorily taken. The State is interested in extending the area of land occupied by good farmers; landlords are interested in the same thing; but the Treasury also is interested, for it has to find the money, and that this is no trifling consideration is indicated by the fact stated here on affidavit, that some of those tenants who are supposed to have the option of waiving the statutory provisions which forbid the compulsory acquisition of their holdings are to be paid more than twenty-five years purchase for their interests. Lastly, the tenants who are interested are those who are *bona fide* tenants, using and cultivating their lands as ordinary farmers, in accordance with proper methods of husbandry, and such people are not, by a side wind, to be got out by giving an answer to the first question upon this memorandum which is a categorical contradiction, in terms, of the words of the Act of Parliament.

HOLMES, L.J. :—

Our judgment must in my opinion depend altogether on the provisions of the Evicted Tenants (Ireland) Act, 1907, as I can find no assistance in construing it from any previous legislation, Section 1 gives the Estates Commissioners power to acquire land compulsorily for the purposes of the Act, and in accordance with its provisions. Section 1, sub-section 3, relates to what is called tenanted land: and it enacts that no tenanted land shall be acquired compulsorily unless it is in the occupation of a new tenant to whom the Act applies, and unless it fulfils another condition therein set forth. The effect of this portion of the section seems to exclude from the operation of the Act tenanted land in the occupation of an old as distinguished from a new tenant, and by very clear language prevents the compulsory acquisition of land occupied by an old tenant. Then follows the remainder of the sub-section, which takes the form of a proviso that no tenanted land shall be acquired compulsorily which is in the possession or occupation of a *bona fide* tenant using or cultivating the same as an ordinary farmer, in accordance with proper methods of husbandry. Tenanted land in the occupation of an old tenant having been taken out of the Act by the first part of the sub-section, the proviso still further restricts its operation in the case of tenanted land in the possession or occupation of a particular kind of new tenant. The section appears to contemplate two classes of new tenants, one answering the description I have already quoted, and the other not coming within it.

The land occupied by a tenant within the description, like land in the occupation of an old tenant, cannot be acquired compulsorily under the Act; and thus the only tenanted land that can be so acquired is land occupied by a tenant to whom the description does not apply. All this is very clearly expressed; and the Act prescribes with equal clearness the manner in which possession of land within the last-mentioned category is to be obtained. The landlord's interest is to be compulsorily acquired in the manner provided by section 1; and the Estates Commissioners having thus become the landlords, section 4 describes the mode in which they are to obtain possession from the tenant.

I turn now to the question for our decision. George Cottingham,

Appeal. 1908. *In re* CLANRICARDE'S ESTATE. Holmes, L.J.

the tenant, and in occupation of a holding on this estate, who is found by the Commissioners to be a "*bona fide* tenant, using or cultivating the same as an ordinary farmer, in accordance with proper methods of husbandry," presented a request in writing, asking the Estates Commissioners "to take steps under the Act to acquire from Lord Clanricarde the lands of which I am at present the tenant, and if they do so I am willing to accept the sum of £220 for the purchase of the tenant's interest in the said lands." The offer thus made has not yet been accepted by the Estates Commissioners, inasmuch as they desired to know whether, if they accepted it, the Act would entitle them to acquire compulsorily the landlord's interest, which is made by the tenant a condition precedent to his proposal. They, therefore, prepared a memorandum submitting three questions for the decision of the Judicial Commissioner, the first of which, and the only one of present importance, was whether the Estates Commissioners, in the circumstances mentioned, are debarred from acquiring the lands under the Act. This was answered by Mr. Justice Wylie in the negative, and is the subject of this appeal.

It is clear from the terms of the proposal that Cottingham is to become tenant to the Commissioners after they have acquired Lord Clanricarde's reversion, and that he is then to sell to them his tenant's interest for £220.

I am satisfied that this is not authorized by the Act, inasmuch as its provisions prevent, in the clearest terms, the acquisition by the Commissioners of lands in the occupation of a tenant coming within the proviso; and the case is stated on the basis that Cottingham comes within it. The only argument in support of the contrary view is that the proviso, having been introduced for the benefit of the tenant, he is entitled to waive it, and thus alter what was enacted by the Legislature. Such a proposition cannot be sustained in the case of a public Statute. Contracts between individuals or corporations are sometimes ratified by Local or Personal Acts of Parliament, and it is possible that the terms of such contracts may be afterwards altered by mutual consent; but there is no analogy between such cases and the present. *Prima facie* there are three parties

interested in the proviso—the landlord, the tenant, and the public, which supplies the money to carry out the purchase. It is, doubtless, the interest of a good and thriving tenant not to be dispossessed of his holding against his will; but it is a much greater grievance to the landlord to be deprived of a holding, the tenant of which practises proper methods of husbandry, pays his rent regularly, and sets a good example to other tenants of the estate, than of a holding allowed to go to waste by an improvident and careless occupier. So, also, the State, whose interest it is to have the lands of the country well cultivated, while prepared to advance public money for the purpose of substituting for bad tenants men who may turn out to be better, might well hesitate to pay for dispossessing good farmers, with the risk of worse men taking their places. I am satisfied that the first question ought to be answered in the affirmative, and this answer also disposes of the other questions.

Solicitor for the appellant: *Hutchison Davidson.*
Solicitor for the Estates Commissioners: *Wm. Alexander.*
Solicitor for the evicted tenants: *Valentine Kilbride.*

R. ST. J. C.

Ross, J.
1908.

HILLHOUSE *v.* TYNDALL.

June 5, 12. *Ecclesiastical lease—Sub-perpetuity grant—Variation of rent—Church Temporalities Acts* (3 *&* 4 *Wm.* 4, *c.* 37; 6 *&* 7 *Wm.* 4, *c.* 99)—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 90—*Money paid by mistake of law to an officer of the Court.*

Where, by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible to determine the amount by which a variable rent should be varied, the rent is, by the application of section 90 of the Land Act, 1903, automatically varied.

The head-grant in perpetuity, dated 31st August, 1839, made pursuant to the Church Temporalities Acts, contained, *inter alia*, a statement, as required by section 138 of the Act 3 & 4 Wm. 4, c. 37, as to the average price of oats for the period of ten years prior to the application for the head-grant. The sub-grant, dated 19th October, 1840, contained the usual recitals, and provided that the rent should be variable, pursuant to the provisions of the said Acts, but contained no statement as to the average price of oats:—

Held, that section 138 of the Act 3 & 4 Wm. 4, c. 37, applied only to head-grants in perpetuity, and that the rent reserved in the sub-grant was a variable one, to which, in consequence of the non-publication of the average prices of produce in the *Dublin Gazette*, section 90 of the Land Act, 1903, applied.

The tenant of lands, the subject of the absolute order for sale in the Land Judge's Court, had for some years, in ignorance of her rights under section 90 of the Land Act, 1903, paid to the receiver a rent in excess of the rent properly demandable:—

Held, under the special circumstances of the case, that the rent over-paid by the tenant in mistake of law should not now be refunded or credited to her.

Reference by the Receiver-Examiner for directions. The tenant of the lands of Kilmanagh, part of the lands comprised in the cause-petition, and over which a receiver had been appointed by the Court, claimed a reduction of 22 per cent. on the old rent of £223 4*s.* 9*d.*, and also a refund of £171 14*s.* 1*d.*, being the amount overpaid to the receiver as from 1st November, 1903.

The rent was reserved by a sub-perpetuity grant, dated 19th October, 1840, made in lieu of a sub-lease pursuant to the provisions of the Church Temporalities Acts, and reciting a head-grant

bearing date 31st August, 1839. The head-grant is sufficiently set out in the judgment of Ross, J. The sub-grant, dated 19th October, 1840, made between Nicholas Tyndall and Peter Magrath recited the sub-lease dated 18th June, 1818, whereby the premises were demised to Peter Magrath for the term of twenty years at the yearly rent of £190 9*s.* 4*d.*, and also on the expiration of every year during the term to the additional rent or sum of one-third part of the fine and expenses of every renewal or renewals. The sub-grant recited also the head-grant, dated 31st August, 1839, recited further that, in pursuance of the said covenant for renewal contained in the said recited indenture of demise of 18th June, 1818, and of the provisions of the Act 6 & 7 Wm. 4, Peter Magrath had applied to Nicholas Tyndall for a conveyance of a perpetual estate in the premises, and that it had been ascertained and agreed upon by the parties that the yearly rent to be added to the reserved rent of £190 9*s.* 4*d.* was £32 15*s.* 5*d.*, making with the reserved rent the yearly sum of £223 4*s.* 9*d.*, and proceeded to grant the premises to Peter Magrath, his heirs and assigns for ever, he the said Peter Magrath, his heirs and assigns, "yielding and paying therefor and thereout yearly and every year unto the said Nicholas Tyndall, his heirs and assigns for ever, the yearly rent or sum of £223 4*s.* 9*d.* sterling, or such increased or diminished rent or sum as shall or may from time to time or at any time hereafter be substituted in the place or stead of such reserved rent, pursuant to the provisions of said recited Acts." The head-grant contained a recital that the Ecclesiastical Commissioners had ascertained in the returns advertised in the *Dublin Gazette* in pursuance of the requirements of the statute the average price of oats for the period of ten years prior to 1st May, 1837, to be 11*s.* 9¼*d.* per barrel, but the sub-grant contained no statement as to the average price of oats.

T. Henry Maxwell, for an annuitant:—

The application by the tenant for a variation of the rent is premature, and cannot be made till the current septennial period elapses. The head-grant makes the rent a variable rent, and the sub-grant also makes it variable; but section 90 of the Land Act of 1903 cannot be applied until the next septennial period arrives.

Ross, J.
1908.
HILLHOUSE
v.
TYNDALL.

The septennial period for the variation of the rent in the sub-grant, prior to the Act of 1903, was May, 1902; the next period will not arrive till May, 1909. The reason for passing sect. 90 of the Act of 1903 was the non-publication of the average prices in the *Gazette*. The *Gazette* has resumed the publication of the average prices; and when the next septennial period arrives, in May, 1909, the averages may then have been published for seven years, and the event will not arise on the happening of which section 90 comes to be applied.

Section 138 of the Act 3 & 4 Wm. 4, c. 37, which, as to sub-grants, is incorporated by sect. 5 of the Act 6 & 7 Wm. 4, c. 99, requires the average price of corn for ten years previous to the application for the grant to be inserted in the conveyance. There is no statement in this sub-grant of the average price for the ten years previous to the application for the sub-grant, though the head-grant contains such a statement. Without such a statement it is impossible to work out the sum in proportion. According to sect. 142 of the Act 3 & 4 Wm. 4, there must be a difference in the two averages of at least one-tenth in order to entitle the tenant to any variation. Consequently it is essential that the ten years' average should be stated in the sub-grant.

Gerald Horan, for John Tyndall, another annuitant:—

The variation can only be made on application to the Commissioners (now the Land Commission) within four months of every septennial period: section 142, 3 & 4 Wm. 4, c. 37. The tenant here might have applied within four months of the last septennial period in 1902. The next application cannot be made till 1909. It is not *solely* by reason of the omission in the *Dublin Gazette* that the rent cannot be varied: *Carson* v. *Jameson* (1).

D. F. Browne, K.C., for the tenant:—

Under section 3 (3) of the Tithe Rentcharge Act, 1900, no variation can be made in any rentcharge, save in accordance with the provisions of the Act. Section 90 of the Land Act, 1903,

(1) [1908] 2 I. R. 308.

makes sections 2 and 3 of that Act applicable to variable rents. Therefore no variation can be made in a variable rent save in accordance with the provisions of the Tithe Rentcharge Act. That Act sweeps away all the machinery of the septennial periods, and substitutes therefor the certificate of the Land Commission. Section 3 (1) of the Tithe Rentcharge Act enacts that the rent shall be "deemed to be varied." Therefore no application for variation is now necessary: *Denny* v. *Wright* (1). The matter being still under the control of the Court, the rent overpaid by the tenant should now be refunded or credited to her. Where money is, under mistake of law, paid to an officer of the Court, the Court, when the mistake is discovered, will direct the money to be refunded: *Ex parte Simmonds* (2); *Ex parte James* (3).

Ross, J.:—

June 12.

In an indenture of 31st August, 1839, made by the Archbishop of Dublin of the first part, the Ecclesiastical Commissioners of the second part, and Nicholas Tyndall of the third part, a prior ecclesiastical lease for twenty-one years renewable by custom is recited which had become vested in Nicholas Tyndall. The deed further recites that all the preliminaries required by the statute 3 & 4 Wm. 4, c. 37, had been complied with; and then goes on to convey the lands to Nicholas Tyndall in fee, subject to the rent of £116 15*s.* 6*d.*, or such increased or diminished rent as should from time to time be substituted therefor, in pursuance of the provisions of the said Act. The grant contains a recital that the Ecclesiastical Commissioners had ascertained in the returns advertised in the *Dublin Gazette* in pursuance of the requirement of the statute the average price of oats for the period of ten years prior to the 1st of May, 1837, to be 11*s.* 9¼*d.* per barrel. By a subgrant of 19th October, 1840, containing a recital of the said principal lease, in pursuance of the said statute and the statute 6 & 7 Wm. 4, Nicholas Tyndall conveyed to Peter Magrath part of the said lands in fee, subject to the rent of £223 4*s.* 9*d.*, or such increased or diminished rent as shall be substituted therefor.

(1) [1906] 2 I. R. 465. (2) 16 Q. B. D. 308. (3) L. R. 9 Ch. App. 609.

Ross, J. 1908. HILLHOUSE v. TYNDALL.

That this rent, under the circumstances mentioned. is a variable rent is now beyond doubt: *Denny* v. *Wright* (1).

The questions are, whether this rent can now be varied, and whether rents paid in excess of the diminished rent by the present applicant can be paid back to her or taken into account in her favour.

In the month of May, 1902, the septennial period expired; and if the return had been properly made in the *Gazette*, the applicant could have had her rent varied, that is to say, if she had made the application within four months after the 1st of May. No such application was made or could have been made, as the returns had not been kept.

In the first place, it is contended that the rent cannot be varied, because under sect. 138 of the Act 3 & 4 Wm. 4, c. 37, the Commissioners had not inserted in the sub-grant the average price of corn for the previous ten years. This proviso has been complied with in the principal grant to which the Commissioners were a party. I think the section only applies to the principal grant, and that a similar provision is not required in the sub-grants. I cannot think that the proviso in sect. 5 of the Act 6 & 7 Wm. 4, requiring that all the provisions in the earlier Act relative to the variation of such rents should be applicable to rents reserved in conveyances to be made under the provisions of the later Act, can have the effect suggested.

Next, it is contended that, under sect. 142 of the Act 3 & 4 Wm. 4, the application must be made within four months after the expiration of the seven years. But here we are obliged to have regard to the provisions of sect. 90 of the Land Act of 1903. Does section 90 apply? I think it does. It became impossible solely by reason of the non-publication of the average prices of produce in the *Dublin Gazette* to determine the amount by which the variable rent should be varied. That being so, sections 2 and 3 of the Tithe Rentcharge Act of 1900 apply as from the commencement of the Act of 1903, *mutatis mutandis*. The result of this is that no application is necessary at all. The moment section 90 is applied, the rent is by virtue of the statute varied. I therefore

(1) [1906] 2 I. R. 465.

decide that section 90 applies, and that the rent is variable and has been varied.

When this matter first came before the Court, I threw out the opinion that, if the rent was variable, the tenant should be credited with the amount overpaid, and be allowed to deduct the amount so overpaid, from future payments of the rent. On consideration I have come to the conclusion that it would not be just to do that. The owners of the rent, who are in straitened circumstances, have been receiving this money and spending it, and are now asked to pay back what has been paid to them through ignorance of the law. The ordinary rule of law is that money paid owing to mistake of law cannot be recovered back. As the matter has been fought out at arm's length, I think it should be decided strictly according to law. Therefore my order will take effect as to all future payments of the rent, and will also apply to all arrears of rent now due.

Solicitor for the annuitant: *H. F. Leachman.*
Solicitor for John Tyndall: *M. L. Horan.*
Solicitors for the tenant: *Little & Cullen.*

D. M. S.

H. L. 1908.

March 24.
May 22.

EVELYN, VISCOUNTESS DE VESCI, AND OTHERS, APPELLANTS; CHARLES O'CONNELL, RESPONDENT (1).

House of Lords—Competency of Appeal—Land Judge—Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), sect. 31, sub-sect. 4; sect. 33, sub-sect. 4—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Right over against indemnifying lands—Priority—Construction of statute.

Upon appeal to the House of Lords from the decision of the Court of Appeal ([1907] 1 I. R. 311, sub nom. *In re Thomson's Estate*; *O'Connell, Petitioner*):—

Held (Lord Ashbourne *dubitante*), that notwithstanding sect. 31, sub-sect. 4, of the Land Law (Ireland) Act, 1896, which confers certain powers on the Land Judge, in like manner as if he were the Land Commission, the appeal lay.

Held, also, that the order of the Court of Appeal should be reversed, and that of Mr. Justice Ross ([1907] 1 I. R. 190) should be restored.

APPEAL by Viscountess de Vesci and others in the same interest from the order of the Court of Appeal, reported [1907] 1 I. R. 311, reversing the order of Ross, J., *ibid.* 190. The respondent made a preliminary objection that no appeal lay to the House of Lords on the ground that, under sect. 31, sub-sect. 4, of the Land Law (Ireland) Act, 1896, the Land Judge in exercising the power of redemption in the present case acted under the statute in like manner as if he were the Land Commission (2).

(1) Before LORD LOREBURN, C., and LORDS ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, ATKINSON, and COLLINS.

(2) "Where a holding is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose, the Land Judge shall have the powers of apportionment and redemption conferred on the Land Commission by sections 15 and 16 of the Land Law (Ireland) Act, 1887, and by section 20 of the Purchase of Land (Ireland) Act, 1891, as the same are amended and extended by this Act, in like manner as if the Land Judge were the Land Commission."

D. F. Browne, K.C., and *J. H. Pigot*, for the respondent in support of the objection.

Ronan, K.C., *Herbert Wilson, K.C.*, and *R. H. Macrory*, for the appellants.

LORD LOREBURN, C. (1) :—

My Lords, in the case of this preliminary objection, I think it fails. The sole ground upon which it is said that an appeal to the House of Lords is excluded is that the Land Judge must be treated as though he were the Land Commission, by virtue of sect. 31, sub-sect. 4, of the Act of 1896 ; otherwise it is not questioned, and cannot be questioned, that an appeal would lie.

I think there is no ground for the objection. The section referred to is the case of a Court receiving new powers; and the measure of competence by which these powers are given is indicated by the words, that the Land Judge shall have the powers "in like manner as if the Land Judge were the Land Commission." That does not affect the appealability of the Land Judge.

LORD ASHBOURNE :—

My Lords, this is a very important preliminary objection which has been discussed before your Lordships with a great deal of force in resistance to the objection made. I confess that, although I am aware that your Lordships have all arrived at the conclusion announced by my noble and learned friend the Lord Chancellor, I entertain most substantial doubts in regard to the case and to the validity of the objection. I would be disposed myself to think that it was not the idea in framing this section that this jurisdiction was left open. Although, therefore, as regards the conclusion arrived at, I am prepared to acquiesce in its soundness owing to the weight of authority of those who hold that opinion, I myself entertain as regards the matter very considerable doubt.

(1) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

H. L. 1908.

DE VESCI v. O'CONNELL.

LORD MACNAGHTEN :—

My Lords, I agree entirely with the opinion of my noble and learned friend on the woolsack.

LORD JAMES OF HEREFORD : —

My Lords, I concur.

LORD ROBERTSON :—

My Lords, in the view which I take, the true starting-point of this question is, that we have here under appeal a decision of the Court of Appeal in Ireland. Unless it is demonstrated that the jurisdiction which the Court of Appeal was exercising was that of an arbiter and not in its ordinary functions, I should hold that an appeal lay unless there were words of definite exclusion. Accordingly, finding, as I do here, a judgment of the Court of Appeal, and not being pointed to anything that takes away the right of the subject to appeal against that tribunal to the King in Parliament, I am constrained to hold that an appeal lies. Accordingly, I absolve myself from a minute tracing of the several jurisdictions of the Land Commission and the Land Judge, and rest my judgment upon the simpler ground.

LORD ATKINSON :—

My Lords, I understood that the Land Judge had, before the passing of the Act of 1896, powers somewhat kindred to those that are conferred upon him by this section, namely, to apportion incumbrances and rents and distribute purchase-moneys; and in the exercise of that jurisdiction the orders which he made would have been subject to appeal to the Irish Court of Appeal, and from that Court to this House. My Lords, I cannot come to the conclusion that the object of the section of the Act of 1896 to which your Lordships have been referred, was to alter those powers so much as to render them no longer subject to appeal to this House. I think they are merely conferring upon him extended powers very much of the same nature that he exercised before, and to effect similar objects, and, therefore, I think there is nothing in the objection.

LORD COLLINS:—

My Lords, I am of the same opinion.

The arguments of the appeal on the merits were proceeded with.

Ronan, K.C., Herbert Wilson, K.C., and *R. H. Macrory*, for the appellants.

D. F. Browne, K.C., and *J. H. Pigot*, for the respondent.

LORD ASHBOURNE:—

May 22.

My Lords, in this case the appellants insist that they have been damnified by the construction placed upon a section of the Land Law (Ireland) Act, 1896, within whose purview they did not come, and which did not purport to apply to them.

The questions involved arise in reference to a fee-farm rent of £404 5*s.* 2*d.*, reserved by a fee-farm grant of 1852 (founded on an original lease of 1745), of which, so far as unredeemed, appellants are now the owners, and depend on the construction of section 33 (4) of the above Act.

By a sub-lease, dated in 1818, part of the lands, called Hall's part, were demised, with covenants for perpetual renewal, to Robert Hall, subject to £17, Irish currency, in part of the rent reserved by the then last renewal of the lease of 1745, the residue of that rent being charged on certain of the lands comprised therein, for the purpose of keeping Robert Hall, his heirs and assigns, indemnified from the said rent beyond the said sum of £17.

By an Incumbered Estates Court conveyance of 1854 certain of the lands held under the original lease were granted to certain parties, subject to certain rents, and with the obligations and rights of indemnity therein stated. These lands are called in the case "the indemnifying lands."

By another Incumbered Estates Court conveyance of 9th May, 1855, another part of the lands held under the original lease were granted to Henry Thomson, and they are called in the case "the indemnified lands.'

H. L. 1908. De Vesci v. O'Connell. Lord Ashbourne.

The lessor was no party to the lease of 1818, and the grantor in the fee-farm grant was no party to the indemnities given by the conveyances of 1854 and 1855.

The indemnified lands were sold under sect. 40 of the Land Law (Ireland) Act, 1896; and by an order of 7th March, 1906, "without prejudice to the existing rights of indemnity," Mr. Justice Ross apportioned the fee-farm rent of £404 5*s.* 2*d.* between the indemnified lands and the other lands granted by the fee-farm grant, and £16 7*s.* 5*d.* was apportioned on the indemnified lands, and £387 17*s.* 9*d.* on the other lands. By the same order it was ordered that the said £16 7*s.* 5*d.* should be redeemed, and the redemption-price was soon after fixed at £450 4*s.*

The redemption was entirely compulsory, and on the fixing and payment of the redemption-price the appellants' rights and interest in the indemnified lands were gone. There remained, however, the adjustment between the grantees of the different portions of the lands comprised in the fee-farm grant of the rights of indemnity referred to. The respondent raised the question involved in this appeal by a motion before Mr. Justice Ross, that the indemnifying lands should be declared well charged with an annual sum (practically equal to the sum redeemed) in equal priority with the said annual sum of £387 17*s.* 9*d.*, being the unredeemed part of the fee-farm rent of £404 5*s.* 2*d.*

It was obvious that this was a grave claim to start against the appellants' property. The indemnifying lands are not now a sufficient security for the portion of the fee-farm rent made primarily payable thereout, and the priority claimed was, as respondent admitted, a complete change in the law and practice heretofore prevailing; but it was urged that the claim could be supported under the literal construction of the section of the Act of 1896 already referred to.

Previous to the Act it was admitted that the claim could not be argued; the apportionment and redemption should be worked out by the orders of the Court, and the equities between the parties liable to, or having the benefit of, the indemnities, should be adjusted *inter se*, possibly by litigation. This section was a new enactment in the Irish Land Purchase Code, and enabled the Land Judge to deal with and adjust those equities.

The Land Judge in the present case decided against the priority claimed, and held that it was the intention of the section to give to the person who had paid the redemption-price an annuity on the indemnifying lands equal in amount to the portion of the rent which had been redeemed, but puisne as theretofore to the unredeemed portion of the head-rent. The learned Judge thought that the mind of the Legislature got into a state of confusion at a certain point in the drafting. I do not think so; but probably a few words might have been added with some advantage.

It would be startling and unjust to make an indemnity given by a tenant, and affecting only his own estate, operate so injuriously on the estate of the landlord, although it would be beneficial, and possibly avoid expensive litigation, to have such a section to work out the equities between tenants *inter se*. The words of the section must be construed with some regard to what had been taking place in the Court, and was its settled law and practice. "The same," in the section, has to be read in connexion with the fact that the lands have passed to new purchasers, and that the part of the rentcharge redeemed is gone. The closing words of the section show that the Judge was given power to deal with the new needs of the position. It cannot have been intended, without express words, to drag the landowner in for the sole purpose of damaging his estate, while a sufficient purpose can be found in desiring to work out equities between those who were parties to the indemnities. If the larger part of the head-rent was redeemed, and then an equivalent indemnity annuity was created, which was to rank in equal priority with the residue of the fee-farm rent, payable out of lands unable to pay in full, it is obvious that the owner would find his residue diminished and imperilled. The Lord Chancellor of Ireland, in giving judgment, said that "the landlord is not within the purview of the section at all." In that I concur, but is not that a powerful reason for not damaging him by applying it to him? The Lord Chancellor also said that "in like manner as if he had purchased the rent," means as if he had purchased from the owner of the rent of £404 5*s*. 2*d*. But it must be noted that the section avoided the use of any such words.

H. L. 1908.

DE VESCI v. O'CONNELL.

Lord Ashbourne.

Mr. Ronan, in his powerful argument for the appellants, relied on the cases of *Ex parte Walton* (1), and *Hill* v. *East and West India Dock Company* (2), as supplying rules of construction which would leave your Lordships free to interpret the section reasonably, and so as to avoid injustice.

Those two cases show that a statute may be construed contrary to its literal meaning when a literal construction would result in a gross injustice, contrary to what must have been the purpose and object of the provision. In those cases the questions turned upon the construction to be given to words of a Bankruptcy Act, which said that upon disclaimer of a lease it should be deemed to have been surrendered, and how far they could be held to bind the lessor. In *Walton's Case* (1) Lord Justice James held that the section "must be understood as saying 'as between the bankrupt and the lessor' the lease shall be deemed to have been surrendered." The same learned Judge also said that in interpreting the section "it must be understood with qualifications to prevent most grievous injustice and most revolting absurdity." Jessel, M.R., also used language strongly to the same effect, and held that the section must be read, "so as not to interfere with the rights of third parties." *Hill's Case* (2), which has the authority of this House, adopted and relied on the reasoning in *Walton's Case* (1), and laid down that, before adopting a literal construction which would do obvious injustice, it was essential to consider what is the object of the provision, and to see what its purpose is. Lord Cairns, in his judgment, said, to take the section literally would be "to do that for which there is no motive, no explanation, and to destroy the rights and property of third persons." Lord Blackburn strongly expressed the same view, and held that the provision should be read as meaning that the lease was only to be deemed to be surrendered "so far as is necessary to effectuate the purposes of the Act, and no further," and so avoid a cruel injustice.

It is to be regretted that, as your Lordships have been informed, these authorities were not mentioned in the Court of Appeal in Ireland.

I think that the order of the Land Judge was correct, and the appeal should be allowed with costs.

(1) 17 Ch. D. 746. (2) 9 App. Cas. 448.

LORD MACNAGHTEN :—

My Lords, I think the order of Mr. Justice Ross was right. It seems to me that the learned Judge did what he was told to do by sect. 33, sub-sect. 4, of the Land Law (Ireland) Act, 1896, and that he performed his task with due regard to the equities of the parties interested.

The position of things may be described roughly, but with sufficient accuracy, in a very few words. Two persons, A and B, are owners in severalty of two lots of land, which I will call lot A and lot B. These two lots originally formed one property. The property was subject to one entire fee-farm rent. On severance it was arranged that lot A should indemnify lot B. The superior landlord, of course, was no party to this arrangement. His rights and remedies were left untouched. As between lot A and lot B, so long as A duly paid the head rent and kept lot B indemnified, there was nothing more that A could be asked to do. Then comes the disturbing element of Irish land legislation. The occupying tenants on lot B purchase their holdings with money advanced by the State. In order to carry out the purchase, it is necessary that incumbrances and charges should be cleared off. That is an essential condition in all cases of State-aided land purchase in Ireland. In accordance with statutory provisions in that behalf the head-rent is apportioned. The amount thrown exclusively on lot B is redeemed by the application of a portion of the purchase-money, to which all incumbrances and charges on the purchased property are transferred by the operation of the Land Purchase Acts, as amended by the Act of 1896.

Now, if it had not been for sub-sect. 4 of sect. 33, B's right of indemnity would still have remained in force for what it might be worth. The right of indemnity in such a case was expressly preserved from the very first. There is a saving clause to this effect in sect. 33 of the Incumbered Estates Act of 1849. That clause is re-enacted in the very same words in sect. 69 of the Act of 1858. But there are no provisions for adjusting equities until you come to the Act of 1896. So it would have been necessary for B, if the case had arisen before that Act, to have sued in Chancery for relief. And then probably A would have objected that it was not his fault that a payment to the head landlord had

H. L. 1908.

DE VESCI v. O'CONNELL.

Lord Macnaghten.

been made out of purchase-money destined for B. The payment, he might have said, was not made at his request; he was, therefore, not liable for the consequences; certainly he was not bound to recoup B for a voluntary outlay. Whatever his liability might be that was not the bargain.

Here I must part company with the learned Land Judge for a moment. I cannot agree with him in thinking that "at this point the mind of the Legislature . . . got into a state of confusion." I think the framers of the Act saw the difficulty clearly, and avoided it with no little skill. Instead of giving B a charge on lot A for the amount deducted from the purchase-money, which might have been inconvenient to the owner of lot A, and was certainly never contemplated when the indemnity was created, it is explained that in relation to the owner of lot A, B is to be regarded as entitled by purchase to the rent apportioned in respect of lot B and redeemed out of the purchase-money advanced by Government. That, of course, is as between B and lot A. The head landlord has nothing to do with equities between A and B. As the Lord Chancellor justly observes, the landlord is not within the contemplation of the section at all. For the apportioned rent thrown exclusively on lot B, and then transferred to the purchase-money, he has been fully paid. He is out of the case altogether.

I do not think that the framers of the Act are to blame for not deeming it possible that a Land Judge administering equity as between A and B would go out of his way to derogate from the rights of a third person who had nothing whatever to do with the matter in hand. The process vulgarly described as robbing Peter to pay Paul is not a principle of equity, nor is it, I think, lightly to be attributed to the Legislature even in an Irish Land Act. But that is exactly the effect of the order under appeal. As between A and B, A was primarily liable, and B was only surety. The order adjusts equities between A and B by giving B a charge on the head landlord's securities, and declaring that B is to rank against those securities *pari passu* with the head landlord. The Lord Chancellor says that is the plain meaning of the Act. I do not think the Act means or says anything of the kind. The Act says that "the person entitled to the purchase-money shall be entitled to the proportion of the . . . rent . . .

redeemed in like manner as if *he* had purchased the same." The emphasis, I think, is on the word "he." In point of fact, *he* did not purchase it. He did not want to purchase it. The State buys and charges him with the purchase-money in the deal with the occupying tenants; but as regards the principal debtor, the Act says he is to be treated as purchaser. Then the Act tells the Land Judge to carry out the transaction on that footing, leaving the details and the machinery to the Judge's discretion. I have only to add that the authorities cited on the one side and on the other do not seem to me to throw any light on the question before your Lordships. As I read the section there is no "statutory fiction" here. There is an illustration given to explain B's position and the rights intended to be secured to him. The illustration seems to me to be simple enough and easy of application, and it is followed by words giving the Court ample powers to carry the enactment into effect. On the other hand, canons of construction which may be of use when the language to be construed is ambiguous or contradictory are hardly wanted where the meaning is perfectly plain.

I think the decision of the Court of Appeal should be reversed with costs, and the order of Mr. Justice Ross restored.

LORD JAMES OF HEREFORD :—

My Lords, I concur.

LORD ROBERTSON :—

My Lords, I also concur.

LORD ATKINSON :—

My Lords, the question for decision in this appeal turns upon the construction of section 33, sub-sect. 4, of the Land Law (Ireland) Act, 1896.

It was a common practice in the Landed Estates Court in Ireland to sell a portion or portions of a tract of land out of which a rent in fee-farm issued, and by the conveyance to provide, as was provided in this case, that the portion or portions sold should be indemnified in whole or in part against payment of the fee-farm rent by the portions unsold. The liability thus thrown

H. L. 1908.

DE VESCI v. O'CONNELL.

Lord Atkinson.

on the unsold portion ranked next in priority to the fee-farm rent, but the rights and remedies of the owner of that rent were entirely unaffected by this arrangement, to which he was an absolute stranger. The lands indemnified, and the lands by which they were indemnified (in this case conveniently styled the indemnifying lands), passed from the purchasers or owners to their respective heirs and assignees, entitled to the benefit of this indemnity, or subject to the burden of it, as the case might be.

There is no doubt, I think, that the rights and equities existing between the owners of the indemnified and indemnifying lands, *quoad* the owner of the fee-farm rent, and also *inter se*, were these: The owner of the rent might distrain for the entire of his rent on any portion of the lands out of which it issued, or he might recover it by any other means open to him from the owner of any one or more of such portions.

On the other hand, the owner of any portion of the indemnified land, who was compelled to pay any part of the fee-farm rent, would have a right in equity to be recouped out of the issues and profits of the lands by which his own lands were indemnified. The form of relief he would seek would probably be to have the sum so paid by him in discharge of the head-rent declared a good charge on the indemnifying lands, next in priority to the fee-farm rent, and to have a receiver appointed over these lands; but it does not, in my opinion, bear argument, that if this course were taken, the rights of the owner of the fee-farm rent would be prejudiced in any way or to any extent.

It is, I think, equally clear that if the provisions of sub-sect. 4 of sect. 33 had never been enacted, and in any proceedings hostile to the owner of the indemnified land—which a sale under the Land Purchase Acts through the instrumentality of the Landed Estates Court may often be—the head-rent had been apportioned, and the part of it assigned to the indemnified land ordered to be redeemed under the other provisions of the Irish Land Code, as has been done in this case, the owner of those lands whose money redeemed this portion would, by means of a similar suit, have been entitled to have the indemnifying lands declared well charged in his favour with a sum equal to the redemption price, next in priority to the fee-farm rent. It may well be, however, that where the sale of

the indemnified lands by their owner under the Purchase of Land (Ireland) Acts is a voluntary act on his part, he would not be entitled to this equitable relief at all. Provisions such as those contained in this sub-section were, therefore, absolutely necessary to protect the voluntary vendor from serious loss, while even in the case of an involuntary vendor they gave relief in a form more convenient than the Court of Chancery could afford. I think, however, it is quite clear that the sub-section deals with the rights, obligations, and equities between the owners of the indemnifying and indemnified lands, arising out of, and consequent upon, the indemnity, and with those alone. And as the indemnity did not touch or affect the rights or interests of the owner of the fee-farm rent, so neither should the relief founded upon it, granted under the provision of this sub-section.

The Court of Appeal have, however, held that the interests of the owner of the indemnified lands are to be protected by means which may seriously prejudice the interest of the owner of the portion of the fee-farm rent still unredeemed; and they apparently felt themselves driven to this conclusion by the following words contained in the sub-section:—"The person entitled to the purchase-money shall be entitled to the proportion of the annuity, rentcharge, or rent so redeemed, in like manner as if he had purchased the same." The sub-section, however, does not say "as if he had purchased the same from the owner thereof." And the very next provision of the sub-section shows conclusively that he is not placed in the position "of a purchaser from the owner," because, whereas a purchaser from the owner would be entitled to recover the part of the rent purchased out of the lands from which either the whole rent originally issued, or at least out of the whole of the indemnifying lands, in the same right, by the same remedies, and subject to the same conditions as the original owner enjoyed or was subject to, this hypothetical purchaser can only recover his portion of the rent out of such lands as the Court may direct, and subject to such provisions as the Court thinks necessary to carry the sub-section into effect.

It is not necessary in this case to express any opinion as to whether those latter words would include "lands" belonging to the owner of the indemnifying lands, other than those out of which

H. L. 1908.

DE VESCI v. O'CONNELL.

Lord Atkinson.

the fee-farm rent issued. It is clear, however, that the Court would have jurisdiction to direct that the portion of the head-rent, so hypothetically purchased, should be paid out of a portion only of the indemnifying lands, instead of out of the whole.

In this particular case orders for apportionment and redemption have been made by Mr. Justice Ross. They are not appealed against. The order appealed against presupposes, as it must, that redemption has taken place, otherwise it would not be authorized by the sub-section; and, if so, the portion of the rent redeemed has, under the provisions of the preceding section (sect. 31), ceased to be a charge upon, or to issue out of, any land whatever. It is extinguished as a rent, and, strictly speaking, cannot be purchased by anyone or from anyone. But by what has been styled—rightly it would appear to me—a legal fiction, the person whose money has redeemed this portion of the fee-farm rent is, as against the principal debtor, the person bound to pay the entire of the rent, and to save him from the payment of any portion of it, to be treated as if he had acquired by purchase the portion redeemed, the owner of the indemnifying lands thus continuing to pay a sum equivalent to the entire of the fee-farm rent, and the owner of the indemnified lands receiving from him annually a sum of money equal to the proportion of the rent which he has redeemed.

The rule of construction laid down in *Ex parte Walton* (1), and approved of and adopted in *Hill* v. *East and West India Dock Company* (2), is, therefore, in my view, applicable to the construction of sub-sect. 4, sect. 33, of this statute, and the sub-section accordingly must be held to be conversant solely with interests subordinate to the rights of the owner of the fee-farm rent, and cannot be applied in such a manner as to prejudice that person's security for the portion of his rent unredeemed. The sub-section must, therefore, I think, be read as if this portion of it ran thus: "The person entitled to the purchase-money shall, *as between him and the owner of the lands by which the lands sold were indemnified*, be entitled to the proportion of the annuity, rentcharge, or rent so redeemed, in like manner as if he had purchased the same."

(1) 17 Ch. Div. 746. (2) 9 App. Cas. 456.

With all respect to the Irish Court of Appeal, I think the decision appealed against was erroneous, and should be reversed; that the order and judgment of Mr. Justice Ross was right, and should be restored, and this appeal be allowed with costs.

LORD COLLINS:—

My Lords, I agree.

LORD LOREBURN, C.:—

My Lords, I agree with the conclusion at which your Lordships have arrived, and I will only say that I think the words in question are to be construed to effect the purposes of the Act, and not to affect the parties whom it was not the purpose of the Act to touch.

QUESTIONS PUT:—

That the order appealed from be reversed.

The Contents have it.

That the order of Mr. Justice Ross be restored.

The Contents have it.

That the respondents do pay to the appellants their costs here and below.

The Contents have it.

Solicitors for the appellants: *Crawley, Arnold, & Co.*, for *S. S. & E. Reeves & Sons.*

Solicitors for the respondent: *J. H. & K. R. Cobb*, for *Thomas F. O'Connell & Son.*

H. L.
1908

March 27.
April 7, 8.

JAMES HENNESSY & CO., APPELLANTS; KEATING, RESPONDENT.

Injunction—Trade mark—Label—Similarity—Likelihood of deception.

APPEAL by the plaintiffs from the order of the Court of Appeal, *ante*, p. 73, reversing the order of Meredith, M.R., *ante*, p. 57, and dismissing the action.

Sir Robert B. Finlay, K.C. (of the English Bar), and *Right Hon. J. H. Campbell, K.C.* (*A. F. Blood, K.C.*, and *Figgis* with them), for the appellants.

Ronan, K.C., and *James O'Connor*, for the respondent, were not called on.

April 8.

The House of Lords (LORD LOREBURN, C., and LORDS ASHBOURNE, MACNAGHTEN, ROBERTSON, ATKINSON, and COLLINS) affirmed the decision of the Court of Appeal, holding, as a matter of fact, that the respondent's label was not a colourable imitation or infringement of the plaintiffs' label. Appeal dismissed with costs (1).

Solicitors for the appellants: *Kekewich, Smith, & Kaye*, for *A. D. Kennedy & Figgis.*

Solicitors for the respondent: *Robert J. Sheehy*, for *Cornelius O'Rorke.*

(1) See Weekly Notes, 1908, p. 95; 25 R. P. C. 361.

In the MATTER of the ESTATE of HELENA RYAN.

Wylie, J.
1908.
June 22.
July 8, 9.

Land Purchase Acts—Lands sold held under lease for lives renewable for ever —Arrears of renewal fines—Payment of—Priority.

Where lands held under a lease for lives renewable for ever are sold under the Land Purchase Acts, the redemption-price of the rent reserved by the lease is entitled to be paid in priority to any claim for arrears of renewal fines.

Hearing of objection of Mary Kidd to the final schedule of incumbrances.

The lands sold in this matter were held under a lease for lives renewable for ever, dated 26th June, 1819, subject to a rent of £114 12*s.* 2*d.* (Irish), equivalent to £105 15*s.* 10*d.*, sterling, and to a renewal fine of £28 5*s.* (Irish) on the dropping of each life. The last renewal was made in 1837. Two of the lives mentioned in the last renewal had since dropped. There was no evidence as to the other life. On the 18th June, 1902, the Land Judge, in consideration of £1000, conveyed the reversion expectant upon the said lease to Mary Kidd, subject to the said lease. There was no reference in the conveyance to any renewal of the said lease, or to whether any lives were in being, nor was there any assignment of arrears of rent, or of renewal fines, or any reference to same.

Proceedings for sale under the Irish Land Act, 1903, were subsequently instituted by the lessee, and on the 21st November, 1907, the usual order was made attaching claims to the purchase-money.

The entire purchase-money amounted to £2100.

On the 27th February, 1908, an order was made for the redemption of the rent of £105 15*s.* 10*d.*, and of any exceptions or reservations in the said lease, and the value of the reversion thereon, at the sum of £2100. That sum included the value of all future fines, which, if a fee-farm grant had been taken out, would have been included in the fee-farm rent, but no arrears of

Wylie, J. 1908.

In re RYAN'S ESTATE.

fines, whether accrued since the purchase in 1902, or during the ownership of any preceding owner of the reversion.

The entire purchase-money, with the bonus added, after redeeming prior outgoings, was insufficient to satisfy the redemption-price of the rent and renewal fines.

The Examiner had placed the renewal fines, on the final schedule, in priority to the redemption-price of the rent.

By her objection Mary Kidd claimed to have the redemption-price of the rent paid in priority to the claim for renewal fines.

Jefferson, K.C., for the vendor.

H. D. Conner, K.C., for Mary Kidd :—

Renewal fines are not entitled to priority over the redemption-price of the rent. Under the Landlord and Tenant (Ireland) Act, 1870, in the case of a leasehold interest, the interest of the lessee was all that could be vested in the tenant. There was no power to vest the fee : see sections 32, 35, and 44. See also sections 24 (*b*), 26, and 29 of the Land Law (Ireland) Act, 1881, and sections 8 and 9 of the Purchase of Land (Ireland) Act, 1885. Under section 16 of the Land Law (Ireland) Act, 1887, power is first given to redeem superior interests. Under that section there is no power to deal with fines. Under section 20 of that Act the Land Commission charge would have been a first charge next to the rent reserved by the lease. Under sect. 20 of the Purchase of Land (Ireland) Act, 1891, power is first given as to the payment of the redemption-price of the rent. Under sect. 31 of the Land Law (Ireland) Act, 1896, the redemption of the reversion is first dealt with. It would not affect the question of arrears of fines. Under the Renewable Leasehold Conversion Act the only restrictions placed on the parties are that the lessee must require the owner to make a fee-farm grant, and the owner shall not be obliged to grant it until all the fines are paid. It would be open to the owner to make a fee-farm grant without regard to past fines. Further, under sect. 61 of the Landed Estates Court Act, a Land Judge's conveyance passes the fee-simple of the land, subject only to such charges, &c., as are expressly mentioned. The conveyance of 1902 contained no reference to renewal fines.

The present owner of the reversion is the *dominus* of the whole matter. Persons who might have been entitled to past fines have no remedy in regard to them, either legal or equitable. The present owner is not in any sense a trustee for them, or bound to proceed against the lessee to recover past fines. Such a course would in the present case be absurd, inasmuch as the rent payable under the lease was the full value of the premises, and the lessee had no interest in renewing. The lessee's right is a mere *chose in action*: Lyne on Leases, p. 7.

C. F. Doyle, K.C., and *Gerald FitzGibbon, K.C.*, for H. B. Weldon, owner of the reversion prior to 1902 :—

For the purpose of redemption under the Land Purchase Acts the rent must be treated as if the lessor had taken out a fee-farm grant prior to the sale. In order to take out a fee-farm grant, the lessee would have been bound to pay all arrears of fines. A valuable part of the reversion was that the lessee was bound to pay all fines before getting a fee-farm grant. A tenant under a lease for lives renewable for ever may be compelled to accept a fee-farm grant, though the lease contains no express covenant by the lessee to renew: *Ward* v. *M'Roberts* (1); see also *Steele* v. *M'Call* (2); *De Voeux* v. *Mara* (3); *Donnelly* v. *Foss* (4); *Ex parte Scott* (5). The fines are payable in priority to the redemption-price of the rent.

WYLIE, J. :— July 9.

The vendor in this case held the lands under a lease for lives renewable for ever, dated 26th June, 1819, the last renewal being in 1837. Her interest under that lease entitled her under the Land Purchase Acts to sell the fee, and the sale of the fee having been sanctioned by the Estates Commissioners, the usual order was made on the 21st November, 1907, attaching the claims of all persons interested in the lands to the purchase-money in like manner as immediately before the date of the order they attached

(1) 25 L. R. Ir. 224.
(2) 7 Ir. Ch. R. 122.
(3) 15 Ir. Ch. R. 16.
(4) 7 L. R. Ir. 439.
(5) [1906] 1 I. R. 159.

Wylie, J. 1908.

In re Ryan's Estate.

to the lands. The said lease reserved a rent of £114 12*s.* 2*d.* (Irish), equivalent to £105 15*s.* 10*d.* sterling, and a renewal fine of £28 5*s.* (Irish) on the dropping of each life. Two of the lives in the last renewal dropped some years ago. There is no evidence as to the other life.

On the 18th of June, 1902, the Land Judge conveyed the reversion upon the said lease, in consideration of £1000, to Mary Kidd, subject to said lease of 26th June, 1819. There is no reference in the conveyance to any renewal of the lease or to whether any lives were in being, nor was there any assignment of arrears of rent, or of renewal fines, or any reference to same.

On the 27th February, 1908, an order was made for the redemption of the rent of £105 15*s.* 10*d.* and of any exceptions or reservations in the lease, and the value of the reversion thereon, at the sum of £2100. That sum included the value of all future fines, which, if a fee-farm grant had been taken out, would have been included in the fee-farm rent, but no arrears of fines, whether accrued since the purchase in 1902 or during the ownership of any preceding owner of the reversion.

The entire purchase-money of the estate is only £2100, which with bonus added, after redeeming prior outgoings, such as tithe rentcharge, is insufficient to satisfy the redemption-price of the rent and arrears of rent; and therefore there is no money for the payment of renewal fines, unless they are to be paid in priority to the redemption-price of the rent.

The Examiner has placed these renewal fines on the final schedule in such priority; and Mary Kidd has filed an objection claiming priority for the redemption-price of the rent over the claim for renewal fines; and the only question I have to decide is, which is entitled to priority?

Under section 16, sub-sect. 1, and section 24, sub-sect. 1, of the Act of 1903, all claims that attached to the land prior to the date of the vesting order, as from that date attach to the purchase-money in like manner as they attached to the land, and by section 31, sub-section 1, of the Act of 1896, are to be redeemed or satisfied out of such purchase-money. If the purchase-money is not sufficient to redeem or satisfy all, they must be paid according to their proper priority.

Now, how were the claims for arrears of fines and for the rent respectively attached to the land prior to the sale? The arrears of fines were not a charge upon the land: they were secured only by the personal covenant of the lessee. No doubt the lessee could not claim a renewal of the lease or a fee-farm grant without paying up all arrears of fines, whether due to the then owner of the reversion or some predecessor in title. But they could not be enforced against the land or raised out of it as a charge. The rent, on the other hand, is secured by the entire fee-simple value of the land. If the lessee does not pay, she can be evicted for non-payment and the lease determined, and the reversioner would have the fee discharged of the lease.

It was not contended, nor, I think, could it be contended, that, in such a case, the reversioner would take possession of the fee discharged of the lease, but subject to arrears of fines or of rent due to her predecessor in title.

It was contended that, as the lessee had sold the fee, the purchase-money which represents the fee must be dealt with as if the lessee had taken out a fee-farm grant prior to the sale, and that, as, in order to get a fee-farm grant, the lessee would have had to pay all the arrears of fines, these arrears should be paid out of the purchase-money. As against any interest of the vendor in the purchase-money, I think that contention is right, though I am not now called upon to decide it. But supposing the lessee had taken out a fee-farm grant, what would have happened? Why, the grantee would have paid out of her other property all arrears of fines and rent, and have taken the fee subject to a fee-farm rent made up of the former rent payable under the lease, together with such addition thereto as would represent the future fines payable under the lease. In that case the owner of the reversion would still have the entire fee-farm rent secured by the entire fee-simple value of the lands.

If, on the other hand, the lessee, either from inability or unwillingness, had declined to pay the fines or take out a fee-farm grant, the lease would have determined, and the reversioner could have recovered possession discharged of the lease and free from all claims for arrears of fines.

Therefore, it appears to me clear, that no matter which of the

Wylie, J. 1908. *In re* RYAN'S ESTATE.

three courses the lessee might have taken, whether she had allowed the lease to be evicted for non-payment of rent, or to be determined by a refusal to renew or to take a fee-farm grant, or had paid the fines in arrear and taken out a fee-farm grant, the reversioner in each case would have had his reversionary interest secured to him by the value of the entire fee-simple of the lands free from any claim against, or charge upon, the lands for arrears of fines.

That being so, it seems to me also clear that, under the Land Purchase Acts and the order attaching claims to the purchase-money, which represents the fee, the reversioner is entitled to be placed in the same position as regards the purchase-money, *i.e.* to have the value or redemption-price of his reversionary interest secured by the entire purchase-money free from all claims for arrears of fines, but subject of course to the redemption of all interests superior to both.

In my opinion, therefore, the redemption-price of the reversionary interest must be paid out of the purchase-money in priority to the claim for arrears of fines, and the objection of Mary Kidd must be allowed.

Solicitor for the vendor: *Robert J. Ferguson.*
Solicitors for Mary Kidd: *Kenny & Stephenson.*
Solicitor for H. B. Weldon: *D. Doyle.*

J. E. W.

IN RE NORTHERN MILLING CO.

Barton, J.
1908.
March 3.

Company—Compulsory winding-up—Sale of mortgaged premises by liquidator with consent of mortgagee—Proceeds insufficient to pay mortgage debt—Liquidator's costs.

In the course of a compulsory winding-up, the liquidator sold mortgaged premises with the consent of the mortgagee. The proceeds were insufficient to pay the mortgage in full:—

Held, that the liquidator was entitled to retain out of the proceeds the costs of realization.

Hilliard v. *Moriarty* ([1894] 1 I. R. 316) distinguished.

AN order was made for the compulsory winding-up of the Northern Milling Co., Ltd., on March 19th, 1907; and a liquidator was appointed by the Court on April 15th, 1907. The Company had ceased business; and the liquidator, with the approval of all parties concerned, came to the Court immediately after his appointment with an application to have an offer for the purchase of the Company's premises accepted. The Provincial Bank of Ireland were the Company's bankers, and were equitable mortgagees of the premises. The Bank consented to the liquidator's application, and recommended its acceptance by the Court. The purchase-money was insufficient to pay the whole of the moneys due to the Company for principal, interest, and costs. The liquidator claimed to be entitled to retain the costs of realization, and the Bank disputed the claim.

H. Wilson, K.C., for the Provincial Bank:—

There is no reason why the same rule should not apply as in an administration suit. *Hilliard* v. *Moriarty* (1) shows that in administration suits costs of sale cannot be retained as against a mortgagee who allows his security to be realized in the suit.

(1) [1894] 1 I. R. 316.

Barton, J.
1908.

In re NORTHERN MILLING CO.

Ignatius O'Brien, K.C., for the Company :—

The liquidator is entitled to retain his costs of realization: *In re Marine Mansions Co.* (1); *Oriental Hotels Co.* (2); *In re Regent's Canal Ironworks Co.* (3).

BARTON, J. :—

As regards the costs of realization, the practice appears to be that the liquidator is allowed to deduct them. In *In re Marine Mansions Co.* (1) the order was to that effect. In *In re Oriental Hotels Co.* (2) Wickens, V.-C., ordered the expenses of realization to be payable out of the proceeds of sale, in priority to any claim of the mortgagee. In *In re Regent's Canal Ironworks Co.* (3) the Court of Appeal in England held that the costs of realization should be paid out of the proceeds before paying the fund over to debenture-holders; and James, L.J., at p. 427, directed his attention specially to the point. The leading text-books recognize the practice. In this Court the question does not often arise. In the ordinary case of a series of debentures, the debenture-holders usually realize their security in an action of their own. In the present case, however, we have a single mortgagee who prefers to have his security realized for him by the liquidator.

Mr. Wilson asked me to apply *Hilliard* v. *Moriarty* (4), which in this Court regulates, as a general rule, the practice in administration suits; but the practice appears to be different in winding-up. That may, perhaps, be because the position of the liquidator under the Companies Acts is not in all respects the same as that of the personal representative in an administration suit. At all events, I must apply the practice as I find it.

Solicitors for the Provincial Bank: *Carson & McDowell.*
Solicitors for the Company: *L'Estrange & Brett.*

W. M'G.

(1) L. R. 4 Eq. 601.
(2) L. R. 12 Eq. 126.
(3) 3 Ch. D. 411.
(4) [1894] 1 I. R. 316.

IN RE DOMVILE AND CALLWELL'S CONTRACT.

(1908. No. 491.)

Barton, J.
1908.
April 23, 24.
June 4.

Appeal.
June 23, 24.
July 8.

Vendor and purchaser—Settled Land Acts, 1882-1890—*Settlement—Life estate—Power of jointuring—Disentailing deed—Re-settlement—Restoration of original life estate and power of jointuring—Creation of new powers of charging—Compound settlement.*

A tenant for life agreed to sell portion of the settled lands, under the Settled Land Act. The lands were originally settled on the vendor for life, with remainder to his first and other sons in tail, by the will of his uncle. The will also contained powers of jointuring and charging the lands with portions for younger children. The vendor joined with his eldest son in a disentailing deed, and conveyed the lands to trustees, to such uses as the vendor and his eldest son should jointly appoint; and in default of and until such appointment, upon the pre-existing trusts of the will, and so as to restore the same uses and powers. The trustees of this deed were appointed trustees for the purposes of the Settled Land Acts. Some time afterwards the vendor joined with his eldest son in a deed, whereby he released the power of charging portions under the will, and in lieu thereof he and his eldest son, under the power of appointment in the disentailing deed, appointed the settled lands to trustees for a term, for the purpose of raising new charges for younger children. Subsequently, by a deed of appointment, in exercise of the power given them in the disentailing deed, the vendor and his eldest son settled the lands upon the vendor for life, with remainder over. The life estate was expressed to be in restoration of the vendor's former life estate under his uncle's will, and the power of jointuring thereunder was restored. The deed conferred certain powers of jointuring by future tenants for life, and of charging the lands with portions for younger children, and with payment of certain sums for purposes therein specified. The trustees of the deed were appointed trustees for the purposes of the Settled Land Acts. In exercise of the power under the will and resettlement the vendor duly executed by deed his power of jointuring on the occasion of his subsequent marriage. The purchaser required trustees of a compound settlement, consisting of all the above-mentioned documents, to be appointed. The vendor refused to do so, but offered to appoint trustees, for the purposes of the settled Land Acts, of the will only:—

Held, by Barton, J., that trustees of the will only should be appointed.

Held, by the Court of Appeal (reversing the decision of Barton, J.), that the will and subsequent instruments constituted a compound settlement, under

Barton, J. 1908.

In re Domvile & Callwell's Contract.

which the lands stood limited by way of succession at the date of the contract for sale, and that the purchasers were entitled to require the appointment of trustees of such compound settlement for the purposes of the Settled Land Acts.

Vendor and Purchaser Summons.

By articles of agreement, dated the 24th January, 1908, the vendor, Major Herbert Winnington Domvile, as tenant for life, agreed to sell, subject to a certain lease specified in the schedule thereto, the fee-simple in possession, free from incumbrances, of a certain portion of the Domvile settled estates, consisting of 42 acres 7 perches of the lands of Ballybrack, in the county of Dublin, to Amy Louisa Charlotte Callwell, Gertrude Emma Callwell, May Alberta Callwell, Helen Lindsay May Callwell, and Ida Eleanor Callwell, for the sum of £10,000.

By article 2 of the above-mentioned agreement the purchasers were required to pay a deposit of £50, and to pay the residue of the purchase-money to "trustees of the estate of the vendor, properly constituted and entitled to give a receipt for the same, under the Settled Land Acts, 1882 to 1890," on the day appointed for completion.

The vendor became entitled, under the will, dated the 20th February, 1847, of his uncle, Compton Charles Domvile, senior, as tenant for life of the Domvile settled estates, with remainder to his first and other sons in tail, on the 22nd July, 1891. The will contained certain powers of jointuring and portioning, and of appointing the settled lands for terms of years upon trust for securing a jointure and for raising £12,000 for younger children.

By a disentailing deed, dated the 9th December, 1891, made between the vendor, Herbert Winnington Domvile, of the first part, Compton Charles Domvile, junior (his eldest son), of the second part, and John Raynor Arthur and Campbell Montague Edward Wynne, of the third part, after reciting the above-mentioned will, the vendor and his eldest son conveyed the settled lands to the above-mentioned parties of the third part, subject to the uses and estates limited or created by the said will which preceded the estates in tail male of the said Compton Charles Domvile, other than the estates thereby, or by reference thereto, limited to the vendor for his life, and to the powers annexed to or exercisable during the continuance of such preced-

ing uses and estates, respectively (other than as last aforesaid); and to the uses and estates limited or created, or to be limited or created, in exercise of such powers, but discharged from all estates in tail male or in tail of the said Compton Charles Domvile at law or in equity, and all estates, rights, interests, and powers to take effect after the determination, or in defeasance of such estates in tail male or in tail; To such uses upon such trusts, and subject to such powers and provisions, as the vendor and Compton Charles Domvile should, at any time or times thereafter, by any deed revocable or irrevocable, jointly appoint, and in default of and subject to any such appointment; To the uses upon the trusts and subject to the powers and provisions to, upon, and subject to which under or by virtue of the thereinbefore recited will the same premises respectively stood limited and settled immediately before the execution of these presents, or such of the same uses, trusts, powers, and provisions as should then be subsisting, or capable of taking effect, and so as to restore and confirm the same uses, trusts, powers, and provisions. The trustees of this deed were appointed trustees for the purposes of the Settled Land Acts.

By an indenture, dated 28th June, 1895, made between the vendor, of the first part, Compton Charles Domvile, of the second part, and Ingram Whitaker and Geo. Hill Major (the trustees), of the third part, reciting the will of Compton Charles Domvile, senior, and the above-mentioned disentailing deed of the 9th December, 1891, and reciting that the vendor was minded not to exercise the power in that behalf contained in the will of the said Compton Charles Domvile, senior, of charging the said lands and hereditaments, or any of them, with £12,000 in favour of his younger children, but was desirous of making such provision in lieu thereof for Rose Margaret Domvile and Grace Frances Domvile, and any other children that might thereafter be born to him, and had requested his son, the said Compton Charles Domvile, to assist him in carrying out the said desire by making such joint appointment as was thereinafter contained, which the said Compton Charles Domvile had agreed to do, in consideration of such release by the vendor of the powers of charging the said hereditaments with portions for his younger children, conferred by the said recited will, as was thereinafter contained; It was witnessed that in pursuance of the

Barton, J. 1908.

In re DOMVILE & CALLWELL'S CONTRACT.

said agreement, and in consideration of the premises, the vendor and Compton Charles Domvile, as settlors, in exercise of the powers in that behalf given to them by the said indenture of 9th December, 1891, and of every other power them thereunto enabling, thereby irrevocably appointed the settled lands to the trustees therein named, for the term of 500 years, to commence from the death of the vendor, and subject thereto, to such uses, upon such trusts, and subject to such powers and provisions as the vendor and Compton Charles Domvile should at any time or times thereafter by deed jointly appoint, and in default of and subject to any such appointment to the uses upon the trusts, and subject to the powers and provisions to, upon, and subject to which under, or by virtue of, the said will of the said Compton Charles Domvile, senior, and of the recited indenture of the 9th December, 1891, or either of them, the same premises respectively stood limited and settled immediately before the execution of this deed, or such of the same uses, trusts, powers, and provisions, as were then subsisting, or capable of taking effect, and so as to restore and confirm the same uses, trusts, powers, and provisions. The deed then declared that the said lands were limited to the use of the trustees for the said term of 500 years in trust to raise by sale or mortgage the sum of £8000, as portions for the said Rose Margaret Domvile and Grace Frances Domvile, and the child or children (if any) thereafter to be born to the vendor in such manner as the vendor should appoint, and in default of appointment, and subject to any such appointment, in trust for the child or children of the vendor. By the same deed the vendor absolutely and irrevocably disclaimed and released the lands from the power under the will of Compton Charles Domvile, senior, enabling him to appoint the lands to trustees for the purpose of raising portions for his children. The trustees of the deed were appointed trustees for the purposes of the Settled Land Acts.

By an indenture dated 6th October, 1904, made between the vendor and his son Compton Charles Domvile, of the one part, and Thomas Falls and Hubert Graves Archer (the trustees), of the other part, after, *inter alia*, reciting the will of Compton Charles Domvile, senior, and reciting the above-mentioned deeds of 9th December, 1891, and 28th June, 1895, and reciting that the vendor and Compton Charles Domvile had agreed to make such appoint-

ment and settlement of the said lands as was thereinafter contained, it was witnessed that the vendor and Compton Charles Domvile, as settlors, in exercise of the powers vested in them by the said indentures of 9th December, 1891, and 28th June, 1895, or either of them, and of every other power enabling them in that behalf, did thereby direct and appoint that the settled lands then subject to the joint appointment of the vendor and Compton Charles Domvile should thenceforth remain and be to the uses upon the trusts and subject to the powers and provisions thereinafter declared concerning the same, viz., to such uses, upon such trusts, and subject to such powers, and with and subject to such provisions, as the vendor and Compton Charles Domvile should jointly by any deed appoint, and in default of such appointment, and so far as no such appointment should extend, to the use that the said Compton Charles Domvile and his assigns should during the joint lives of himself and the vendor receive a yearly rentcharge of £200, to commence from the 1st January then last and to be charged upon and issuing out of the hereditaments and premises thereby settled, and to the further use that in case the said Compton Charles Domvile should die in the lifetime of the vendor, leaving a widow him surviving, such widow should from the death of the said Compton Charles Domvile and during the joint lives of herself and the vendor receive the said yearly rentcharge of £200, and subject to such rentcharge to the use of the trustees for the term of 1000 years upon the trusts thereinafter declared concerning the same, and subject thereto to the use of the vendor during his life in restoration of his former life estate under the said will of the said Compton Charles Domvile, senior, deceased, and so that the power of jointuring a future wife and of limiting the said lands and hereditaments for a term of years to secure the same given to him by the said will should be also restored and remain in full force, with remainder, subject to a certain yearly rentcharge of £500 created by an indenture of the 22nd September, 1880, under the provisions of the said will, to Compton Charles Domvile for life, remainder to his first and other sons in tail male, remainder over. And it was declared that the hereditaments were thereinbefore limited to the trustees for the said term of 1000 years, upon trust to raise and pay to the

Barton, J. 1908.

In re DOMVILE & CALLWELL'S CONTRACT.

vendor the sum of £1000 expended by him in repairing the demesne walls, and it was also agreed that the vendor should have power by deed or will to charge the hereditaments with payment of a sum or sums sufficient to defray costs already incurred and to be incurred in connexion with certain legal proceedings therein specified. The deed also contained powers of jointuring by any future tenant for life under the provisions of the deed and powers of charging the lands with portions for younger children. The trustees of this deed were appointed trustees for the purposes of the Settled Land Acts.

By an indenture dated 30th October, 1906, executed on the marriage of Harriet Beresford with the vendor, after reciting the above-mentioned deeds, the vendor in exercise of the power vested in him for that purpose by the said will of Compton Charles Domvile, senior, and the thereinbefore recited indenture of settlement of the 6th October, 1904, and of every and any other power in that behalf him enabling, the vendor as settlor did thereby limit and appoint to the use of the said Harriet Beresford and her assigns as her separate property during her life, in case she should survive the vendor, a rentcharge of £200 yearly out of the settled lands secured by a trust term of 100 years.

The purchasers required the vendor to appoint trustees of a compound settlement consisting of the above-mentioned instrument; the vendor, however, declined to do so, but offered to have trustees for the purposes of the Settled Land Acts appointed of the will of Compton Charles Domvile, senior.

Chaytor, K.C., and *Jonathan Pim*, for the purchasers:—

To entitle a person to sell under the Settled Land Acts there must be—(*a*) a "settlement" as defined by section 2 (1) of the Settled Land Act, 1881; (*b*) a tenant for life under that settlement, or other person, having the powers of a tenant for life as defined by the Act; (*c*) trustees with a power of sale, or appointed trustees for the purposes of the Act.

In the present case there is no longer a complete settlement under the will, because by reason of the disentailing deed, and subsequent deeds, the lands are not now limited by way of succession under the will alone. No doubt it has been held that if you

have powers of jointuring or creating portions still in existence, under the original instrument, these powers would constitute a settlement, notwithstanding that the estate in remainder had been disentailed and re-settled: *In re Mundy and Roper's Contract* (1). But here the power of creating portions was expressly extinguished by the re-settlement of 1895, and the jointure now in existence was created under the deed of 1904 as well as under the will. Therefore, the only limitation now in existence under the will alone is the vendor's life estate. Assuming, however, the purchasers' contention is wrong, and that there is still a complete settlement under the will, still there are charges now in existence overriding the settlement, which a conveyance from the tenant for life cannot override: see sect. 20 (2) of the Settled Land Act, 1881. For instance, the £200 annuity to wife of vendor's son created by the deed of 1904. Mortgages for paying costs and repairing the demesne walls created under powers in the deeds of 1895 and 1904, &c. If trustees are appointed of the compound settlement, the purchaser will not be concerned with these charges.

But it is clear the parties contemplated a compound settlement. In the disentailing and subsequent deeds they appointed trustees for the purposes of the Settled Land Acts.

The definition of a settlement under sect. 2 (1) contemplates a settlement consisting of more deeds than one. The conduct of the vendor is unreasonable in the extreme. He is willing to go to the Court and have trustees appointed for the purposes of the settled land of the will, but refuses to have them appointed of the compound settlement, although by a slight alteration in the title of the summons the difficulty involved could easily be overcome.

[Counsel referred to *In re Cornwallis-West and Munro's Contract* (2); *In re Mundy and Roper's Contract* (1); *In re Tibbits' Settled Estates* (3); *In re Meade's Settled Estates* (4).]

Garrett Walker, K.C., and *W. G. Gibson*, for the vendor:—

It is unnecessary to appoint trustees of a compound settlement. The life estate of the vendor under the will of Compton Charles Domvile was expressly restored, as well as the power of jointuring

(1) [1899] 1 Ch. 275.
(2) [1903] 2 Ch. 150.
(3) [1897] 2 Ch. 149.
(4) [1897] 1 I. R. 121.

Barton, J. 1908.

In re DOMVILE & CALLWELL'S CONTRACT.

thereunder. Therefore, there is a settlement in existence, and the conveyance of the tenant for life is effectual to pass the land discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, subject only to charges having priority to the settlement, or charges actually raised at the date of the deed: Settled Land Act, 1881, sect. 20, sub-sect. 2; *In re Wright's Trustees and Marshall* (1); *In re Lord Wimborne and Browne's Contract* (2); *In re Mundy and Roper's Contract* (3); *In re Keck and Hart's Contract* (4); *In re Du Cane and Nettlefold's Contract* (5); *In re Hayes' Settled Estates* (6). The case does not resemble the case of *The Marquis of Ailesbury and Lord Iveagh* (7), where a tenant for life under the last of a number of instruments desired to override jointures or portions created by prior tenants for life under preceding settlements. Here the tenant for life is the original tenant for life under the original settlement, and is exercising his power of sale thereunder.

[The following cases were also referred to:—*In re Spearman Settled Estates* (8); *Wheelwright* v. *Walker* (9); *In re Dickin and Kelsall's Contract* (10). Also the draft Bill now before Parliament to amend the Settled Land Acts, in particular as to the clause dealing with compound settlements.]

June 4.

BARTON, J.:—

This is a purchaser's summons seeking a declaration that the purchaser's objections to title have not been sufficiently answered, and that good title has not been shown.

The title is as follows. The vendor, Major Herbert Domvile, under the will of his uncle, Compton Domvile, and upon the death of Compton Domvile's widow, became, on the 22nd July, 1891, tenant for life in possession of the settled lands, with remainder to his first and other sons in tail. The will contained powers of

(1) 28 Ch. D. 93.
(2) [1904] 1 Ch. 537.
(3) [1899] 1 Ch. 275.
(4) [1898] 1 Ch. 617.
(5) [1898] 2 Ch. 96.
(6) [1907] 1 I. R. 88.
(7) [1893] 2 Ch. 345.
(8) [1906] 2 Ch. 502.
(9) 23 Ch. D. 752.
(10) [1908] 1 Ch. 213.

jointuring and portioning, and of appointing the settled lands for terms of years upon trust for securing a jointure and for raising £12,000 for younger children. By a disentailing deed, dated 9th December, 1891, Major Domvile and his eldest son conveyed their respective estates to trustees to such uses as they should jointly appoint, and, in default of and until such appointment, upon the pre-existing trusts and so as to restore the same uses and powers. In 1895 Major Domvile and his eldest son joined in a deed dated 28th June, 1895, by which Major Domvile released the power, which he had under Compton Domvile's will, of charging the estates with £12,000 for younger children; and in lieu thereof he and his eldest son, in exercise of the joint power of appointment under the disentailing deed of 1891, joined in appointing the settled lands to trustees for a term of 500 years, to commence from the death of the tenant for life, for raising a charge of £8000 for younger children. This deed otherwise restored and confirmed the trusts, uses, and powers of Compton Domvile's will, and the disentailing deed of 1891. Then we come to the deed of re-settlement, dated 6th October, 1904, by which the lands were resettled upon Major Domvile for life with remainder over. The life estate given to Major Domvile was expressed to be in restoration of his former life estate under Compton Domvile's will, and his power of jointuring under the will was specially preserved and restored. The only remaining deed is a jointure deed of the 30th October, 1906, which recites the will and power of jointuring, and conveys the lands to trustees for a term to secure the jointure. The jointure was expressed to be created in exercise of the power vested in him by the will and the re-settlement, and all other powers him enabling. But Major Domvile's only power of jointuring under the will was restored and preserved by the re-settlement.

Under ordinary circumstances I might have contented myself with saying that this case seems to me to be in principle indistinguishable from *Lord Wimborne and Browne's Contract* (1). But Mr. Chaytor's powerful argument for the purchaser must be my excuse for going over ground which is, I think, really covered by that decision, and by the authorities upon which it proceeded.

(1) [1904] 1 Ch. 537.

Barton, J.
1908.

In re DOMVILE & CALLWELL'S CONTRACT.

The principal contention on behalf of the purchaser was, that the settled lands no longer stand limited under or by virtue of the will of Compton Charles Domvile "by way of succession," and consequently that the will does not satisfy the definition of "a settlement" contained in sect. 2 (1) of the Settled Land Act, 1882. But these words "limited by way of succession" have no technical force, and are to be construed liberally. They do not mean that the lands must stand limited by successive estates of freehold. They are satisfied by the existence of jointures or portions charged under, or by virtue of, the instrument in question. Such jointures or portions may, for this purpose, be regarded as limitations in favour of the jointress or portioners. This was decided in *In re Mundy and Roper's Contract* (1), and applied in *In re Lord Wimborne and Browne's Contract* (2). The latter case seems to me to be in principle indistinguishable from the present case, in which we have, irrespective of portions, a jointure created and charged directly under the power of jointuring contained in the will.

It was sought to distinguish the present case, because the jointure was created after the re-settlement, and was expressed to be charged in exercise of the power vested in the tenant for life by the will *and* by the re-settlement and of every or any other power in that behalf him enabling. But this reference to the re-settlement is accounted for by the fact that the power of jointuring under the will was in the usual way restored and preserved by the re-settlement. After such restoration and preservation the power of jointuring continued to be, and was, the old power in the will. That appears to be the effect of *In re Wright's Trustees and Marshall* (3), which was approved and acted on by Stirling, J., in *In re Du Cane and Nettlefold's Contract* (4). I am of opinion that the will is still a "settlement," and that Major Domvile is still tenant for life under that settlement within the meaning of the statute.

It is true that these subsequent deeds—the disentailing deed of 1891, the deed of 1895 charging portions, the re-settlement of

(1) [1899] 1 Ch. 275.
(2) [1904] 1 Ch. 537.
(3) 28 Ch. D. 93.
(4) [1898] 2 Ch. 96.

1904, and the jointure deed of 1906—affect the interests created by the will; so that, in a sense, the will is no longer the only instrument under which the land stands limited by way of succession. But it was held in *In re Du Cane and Nettlefold's Contract* (1), that as a general rule it is not necessary, whenever a deed has been executed affecting the interests and estates effected by the original settlement, to appoint trustees of a compound settlement consisting of the original settlement and the subsequent deed.

Mr. Chaytor relied upon *In re Tibbits' Settled Estates* (2) and *In re Meade's Settled Estates* (3); but they are no longer to be regarded as authorities for Mr. Chaytor's contention. It was at one time thought that, where a jointure had been created under a power in a settlement, it was necessary to appoint trustees of a compound settlement consisting of the settlement and jointure deed in order to override the jointure and transfer it to the purchase-money. That was at one time believed to have been decided in *In re Tibbits' Settled Estates* (2), and in *In re Meade's Settled Estates* (3). But those cases were afterwards explained by Stirling, J., as merely deciding that there was jurisdiction to appoint trustees of a compound settlement in such a case—not that it was necessary to appoint them: *In re Keck and Hart's Contract* (4) and *In re DuCane and Nettlefold's Contract* (1). I acted on Stirling, J.'s, view in *In re Hayes' Settled Estates* (5), and I have nothing to add to what I then said on that subject. In the present case there is undoubted jurisdiction to appoint trustees of a compound settlement. The question is whether it is *necessary* to do so.

In this connexion a difficulty (not noticed by counsel) occurred to me after the arguments had concluded. It occurred to me as arguable that the will does not override the charge for portions under the deed of 1895. That depends on the words of sect. 20 (2) of the Act of 1882, which provides that the conveyance shall override all charges "subsisting or to arise thereunder." This charge was created under the joint power in the disentailing deed, not under the power in the will. I requested counsel to discuss the

(1) [1898] 2 Ch. 96, 108.
(2) [1897] 2 Ch. 149.
(3) [1897] 1 I. R. 121.
(4) [1898] 1 Ch. 617.
(5) [1907] 1 I. R. 88.

Barton, J. 1908.

In re Domville & Callwell's Contract.

question; and on consideration I think that this point (like most points which counsel do not think worth making) is not of any substance. The words of the section are not "subsisting or to arise *under a power contained* in the settlement." If they were, there might be something in the objection. The words are "subsisting or to arise *thereunder*," *i.e.* under the settlement. "Under" and "thereunder" are wide general words, and there is nothing in the context to limit or narrow their meaning. They are contrasted with and explained by the words which immediately follow, "but subject to and with the exception of all estates, interests, and charges having priority of the settlement." It has not been suggested that this charge takes priority of the will. It was created under the immediate authority of the joint power of appointment, which was conferred upon themselves by the tenant for life and remainderman, by virtue of the estates which they took under the will. The charge arises under the will because it arises by virtue of the estates created by the will. The joint power of appointment was the child of the will; the charge created under the joint power of appointment was, if I may say so, its grandchild. Both are "under" the will.

So long as the tenant for life under the will is alive, he can, in my opinion, by the exercise of his statutory power of sale, which is rendered inalienable by section 50 of the Act, override the charges in these subsequent deeds, in all of which his original life estate is preserved and restored. It is unnecessary to say whether it would be so, if it was not preserved and restored. The necessity for a compound settlement in nine cases out of ten only arises, where, as in *The Marquis of Ailesbury's Case* (1), the tenant for life under the latest of a series of instruments wishes to override jointures or portions created by prior tenants for life under earlier settlements. Mr. Chaytor pointed out that, in *In re Mundy and Roper's Contract* (2), trustees of a compound settlement were appointed. That is so, and in that case the tenant for life was selling under a later of a series of instruments. On the other hand, where the tenant for life under the earliest of a series of instruments is alive, and is selling under the earliest instrument,

(1) [1893] 2 Ch. 345. (2) [1899] 1 Ch. 275.

it is only in rare cases (*e.g.* where additional lands are by some subsequent instrument conveyed on the trusts of the settlement) that it is necessary to resort to a compound settlement on account of subsequent dealings with, or subsequent derivative settlements or sub-settlements of, the estates created by the earliest settlement. Mr. Chaytor for the purchaser, relied upon a passage in Farwell, J.'s, judgment in *In re Cornwallis-West and Munro's Contract* (1); but that case was explained, with Farwell, J.'s, authority, by Swinfen-Eady, J., in *Lord Wimborne and Browne's Contract* (2) at p. 542. In the former case it was assumed in argument that the vendor could sell under the will alone, appointing trustees for the purpose of the Settled Land Acts of the will alone; but he did not propose to do so or insist upon doing so. A vendor may have very good reasons for selling under a later instrument, even where he might sell under the earlier. Mr. Chaytor asked me to give the purchaser the benefit of a doubt, on account of the large amount of the purchase-money; but where a vendor stands on his strict rights, the Court is not relieved from its duty of deciding the point at issue by reason of the amount of the purchase-money. There is no flaw or doubt about this title. The Court cannot evade the difficulty (if any) which it may have in applying a statute to the facts of a particular case, by giving the purchaser the benefit of a doubt which ought not to exist where the facts are undisputed and the jurisdiction is statutory. Otherwise the vendor's title and that of purchasers from him in other sales on his estate might be prejudiced, and the titles of other persons in *consimili casû* might be unjustifiably exposed to doubt and uncertainty.

The arguments for the purchaser in this case seem to me to challenge the decision in *In re Lord Wimborne and Browne's Contract* (2) and the other familiar English cases which led up to it. I shall not make an order for costs against the purchasers. It is the first time that these questions have been so fully discussed in this country, and the purchase is an important one.

J. MAC M.

(1) [1903] 2 Ch. 150. (2) [1904] 1 Ch. 537.

Appeal. 1908.

In re DOMVILE & CALLWELL'S CONTRACT.

June 23, 24. July 8.

The purchasers appealed to the Court of Appeal (1).

Chaytor, *K.C.*, and *Pim*, for the appellants :—

Our contention is that the vendor cannot sell as tenant for life under the will of 1847, without trustees being appointed, for the purposes of the Settled Land Acts, of the compound settlement constituted by that will, and the subsequent instruments dealing with the settled lands under which the lands stood limited at the date of the contract for sale. No doubt the vendor is now tenant for life under the will, that life estate having been restored under the deed of 1904; but that is not sufficient. The will alone does not constitute a settlement; it is not an instrument under which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, within sect. 2 of the Settled Land Act, 1882, as the life estate of the vendor is the only interest now subsisting under the will. The "settlement" is now constituted by that will, and the subsequent instruments dealing with the settled lands. Under sect. 20, subsect. 2, of the Settled Land Act, 1882, a conveyance by a tenant for life is effectual to pass the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting, or to arise thereunder"; but here, if the will alone be regarded as the settlement, the trustees of the will cannot give a good discharge for the purchase-money, as there are a number of interests in, and charges upon, the lands outstanding, which do not arise under the will at all, and are not derivative thereout. Thus, under the deed of 1904 (which does not recite the will) the widow of Compton Domvile is entitled during the joint lives of herself and the vendor to a yearly rentcharge of £200; under the same deed there is a term of 500 years limited to the trustees upon trust to raise £8000 for portions for the younger children of the vendor, and they are also empowered to raise £1000 for the costs of the repairs already executed, and further sums for future repairs, and £3000 for the costs of the actions mentioned in the deed. These are not

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

charges arising under the will, and the purchasers cannot get a good receipt without the concurrence of trustees of the instrument under which they do arise.

Lord Wimborne and Browne's Contract (1) is clearly distinguishable, as there, in the words of Swinfen-Eady, J. (at p. 541):— "By reason of the jointure and portions charged and remaining to be raised thereunder the lands still stand limited to persons by way of succession under that instrument."

In *In re Spearman's Settled Estates* (2), Swinfen-Eady, J., decided that effect should be given "to the manifest intention of the parties to create or constitute a compound settlement," and there, as in *In re Marquis of Ailesbury and Lord Iveagh* (3), trustees were appointed of the settlement created by a series of instruments. *In re Wright's Trustees and Marshall* (4) has no bearing on the present case; that was not a case arising under the Settled Land Acts, nor was there any question as to a compound settlement; but the contention of the purchaser was that where a tenant for life and tenant in tail in remainder, by disentailing the estate, absolutely destroyed the old life estate of such tenant, it could not be set up again.

In re Mundy and Roper's Contract (5), and *In re Cornwallis-West and Munro's Contract* (6), are directly in point, and show that the suggested rule, "once a settlement always a settlement," cannot be supported.

[They also referred to *Re the Barry Railway Co.* v. *Lord Wimborne* (7); *In re Tibbits' Settled Estates* (8); *In re Meade's Settled Estates* (9).]

Garrett W. Walker, K.C., and *W. G. Gibson*, for the respondents:—

We contend that to appoint trustees of the compound settlement alleged to exist here would be subversive of the entire principle of the Settled Land Acts, namely, that where you have a

(1) [1904] 1 Ch. 537.
(2) [1906] 2 Ch. 502.
(3) [1893] 2 Ch. 345.
(4) 28 Ch. D. 93.
(5) [1899] 1 Ch. 275.
(6) [1903] 2 Ch. 150.
(7) 76 L. T. 489.
(8) [1897] 2 Ch. 149.
(9) [1897] 1 I. R. 121.

Appeal. 1908. *In re* DOMVILE & CALLWELL'S CONTRACT.

settlement, a tenant for life under the settlement, and trustees of the settlement for the purposes of the Settled Land Acts, the tenant for life may sell the settled lands without regard to any estates or interests arising subsequent to the settlement. The question is not whether there is here a compound settlement, because there may be a simple settlement and a compound settlement existing at the same time; no doubt the lands were re-settled subsequent to the will of 1847, but that does not affect the right of the tenant for life under the will to sell, or the right of the trustees of the will to give valid receipts for the purchase-money. It cannot be denied that under the will the lands stood limited to or in trust for different persons by way of succession; and that being so, it is immaterial that the only interest now subsisting under the will is the life estate of the vendor, as sub-sect. 4 of sect. 2 of the Settled Land Act, 1882, provides that "the determination of the question whether land is settled land for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect," and the will, which constitutes the settlement in the present case, took effect upon the death of the testator: *Re Marquis of Ailesbury and Lord Iveagh* (1); *Re Bective Estate* (2). Further, under sub-sect. 7 of sect. 2 of the Settled Land Act, 1882, a tenant for life is deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent; and by sect. 50 the powers of the tenant for life cannot be assigned: *Cramer Roberts' Estate* (3); whilst under sect. 20 the tenant for life may, as regards land sold, convey the same by deed *for the estate or interest the subject of the settlement*, i.e. in the present case, in fee-simple. *Wheelwright* v. *Walker* (4) shows the drastic power given by the statute to tenants for life. There being, in the present case, a settlement subsisting, namely, the will of 1847, a tenant for life under that settlement, and trustees thereof for the purposes of the Settled Land Acts, the appellants must fail: *Lord Wimborne and Browne's Contract* (5). *In re Tibbits'*

(1) [1893] 2 Ch. 345.
(2) 27 L. R. Ir. 364.
(3) [1907] 1 I. R. 483.
(4) 23 Ch. D. 752.
(5) [1904] 1 Ch. 537.

Settled Estates (1), following *In re Meade's Settled Estates* (2), have not been approved, and should not be followed. *In re Keck and Hart's Contract* (3) and *In re Du Cane and Nettlefold's Contract* (4) are in favour of our contention.

Appeal. 1908. *In re* DOMVILE & CALLWELL'S CONTRACT.

[They also referred to *In re Hayes' Settled Estates* (5) and *In re Knowles' Settled Estates* (6).]

THE LORD CHANCELLOR:—

July 8.

In this case Major Herbert W. Domvile has entered into a contract to sell to the Misses Callwell the fee-simple, free from incumbrances, of certain lands at Ballybrack, in the County of Dublin, for a sum of £10,000.

The vendor purports to make title as tenant for life in possession for the purposes of the Settled Land Acts, under a settlement constituted by the will of Compton C. Domvile, dated 20th February, 1847. There are trustees of the will in existence, and the vendor is willing to have them appointed by the Court trustees of that will for the purposes of the Settled Land Acts. There are, undoubtedly, later settlements of the estates beginning with a disentailing deed operating on the strict settlement under the will, and charges created under those settlements. The vendor contends that the receipt of the trustees of the will of 1847 will be a good discharge to the purchasers as against these charges. The purchasers contend that trustees must be appointed by the Court of the compound settlement, created by the will of 1847 and the later settlements, and have made a requisition on the title to that effect, which the vendor refuses to comply with.

The question has been raised by a summons under the Vendor and Purchaser Act, on which a decision has been made by Mr. Justice Barton in favour of the vendor.

Under the Acts a "settlement" consists of any one instrument, or any number of instruments, by virtue of which any land or any estate or interest in it stands for the time being limited to or in trust for any persons by way of succession; and the powers conferred by the Acts are capable of being exercised

(1) [1897] 2 Ch. 149.
(2) [1897] 1 I. R. 121.
(3) [1898] 1 Ch. 617.
(4) [1898] 2 Ch. 96.
(5) [1907] 1 I. R. 88.
(6) 27 Ch. D. 707.

Appeal. 1908.

In re Domvile & Callwell's Contract.

The Lord Chancellor.

under any instrument which comes within the definitions, provided that there is under it a tenant for life, or a person having his powers (which includes a person whose life estate has been extinguished, as the power annexed to it cannot be extinguished), and also trustees for the purposes of the Acts. The object and effects of the conveyance of such tenant for life are stated in sect. 20 of the Act.

It is settled that in certain cases it is necessary, in order to effectuate the object of conveying the whole estate free from all estates, interests, and charges subsisting or to arise under the settlement, to treat the lands as standing limited under a series of deeds, which in the language of the cases are described as a "compound" settlement.

The material documents and facts may be very shortly stated. On and prior to the 9th December, 1891, the vendor had become tenant for life in possession of the settled lands, with remainder to his first and other sons in tail male. The will contained a power to the tenant for life to create a jointure for a wife, and to charge portions for younger children not exceeding £12,000, and also a power to the trustees to sell, with the consent of an adult tenant for life or tenant in tail.

It is obvious that the vendor could sell the fee-simple under the Settled Land Acts, and that the trustees could give a good receipt for the purchase-money as against a jointress and children's portions.

Compton C. Domvile was the eldest son of Herbert W. Domvile, and he attained twenty-one some time before the 9th December, 1891, on which date the entail was barred, and a re-settlement made by a deed of that date made between Herbert W. Domvile, of the first part, and Compton C. Domvile, of the second part, and J. A. Arthur, and C. W. Wynne, who were the trustees of the will, of the third part.

By this deed, enrolled as a disentailing assurance, Herbert W. Domvile and his son granted the lands, with the consent of the protector of the settlement, to the trustees and their heirs, to hold subject to the uses which preceded the estate tail other than the estate thereby limited to Herbert W. Domvile for his life, and the powers annexed to or exercisable during the continuance of such

preceding uses, other than as last aforesaid, and the uses and estates limited or created in exercise of such powers, but discharged of the estate tail, to such uses as the father and son should appoint, and in default of and subject to any such appointment to the uses and subject to the powers to which, under the will, the same premises stood limited immediately before the execution of the disentailing deed, and so as to restore and confirm same; and the deed contains a declaration that Arthur and Wynne shall be trustees of the settlement thereby made for the purposes of the Settled Land Act, 1882, and any Acts amending the same.

Herbert W. Domvile had, in 1895, three younger children, two of them by a second marriage, and he entered into an arrangement with his eldest son to release the power of charging £12,000 portions which he had under the will of 1847, and, in consideration thereof, that he and Compton C. Domvile, under their joint power in the deed of 1891, should charge the lands with a sum of £8000 as portions for two of these younger children, Rose and Grace, and any future ones. This was carried out by a deed of the 2nd June, 1895, made between Herbert W. Domvile, of the first part, Compton C. Domvile, of the second part, and Ingram Whitaker and George Hill Major, of the third part, and by it, reciting the will of 1847, and the deed of 1891, and the bargain between father and son already referred to, the father and son as settlors, in exercise of their joint power, appointed the lands to the use of the trustees for 500 years, to commence from the death of Herbert W. Domvile, upon trust by sale or mortgage to raise the £8000; and subject to this term the father and son appointed the lands to such uses as they should after appoint, and in default of and subject to such appointment, to the uses to which the lands stood limited under the will of 1847 and the deed of the 9th December, 1891, or either of them, and so as to restore and confirm the same uses; and Herbert W. Domvile released the power of charging portions contained in the will, as if such power had not been inserted in it.

A further deed was executed on the 6th October, 1904, by the father and son under this joint power, the objects of which so far as material were threefold—1, To provide a rentcharge of £200 for Compton C. Domvile during the joint lives of himself

Appeal. 1908.

In re Domvile & Callwell's Contract.

The Lord Chancellor.

and his father, which has ceased to be material, as he died in his father's lifetime; 2, to provide a rentcharge of £200 for any wife of his, during the joint lives of herself and Herbert W. Domvile, if Compton C. Domvile died in her lifetime; and 3, to provide for the raising of a sum of £1000 to repay Herbert W. Domvile the sum expended by him on repairing the demesne wall, and also giving power to Herbert W. Domvile to charge the fee with payment of certain sums incurred for costs in specified actions, not exceeding £3000. These objects were carried out by a deed of 6th October, 1904, made between Herbert W. Domvile and his son, Compton C. Domvile, of the one part, and Thomas Falls and Hubert Graves Archer, who had become trustees of the will of 1847 and settlement of 1891, of the third part, and thereby, after reciting that Herbert W. Domvile and Compton C. Domvile had agreed to make such appointment and settlement as was thereinafter contained, they appointed that the lands should remain and be to such uses as they from time to time should jointly appoint, and in default, and so far as no such appointment should extend, to the use (1) to secure the rentcharge of £200 to Compton C. Domvile, which has failed, (2) to secure a rentcharge of £200 to the widow of Compton C. Domvile during the joint lives of herself and Herbert W. Domvile, and subject to such rentcharge to the use of Falls and Archer for the term of 1000 years, to commence from the date of the deed, for the purpose of raising the £1000, and subject thereto to the use of Herbert W. Domvile for his life in restoration of his former life estate, and the power of jointuring a future wife, and then subject to the agreed £8000 portions to the use of Compton C. Domvile and Henry Koora Domvile, successively, in strict settlement, with an ultimate remainder to Herbert W. Domvile in fee, and power was given to Herbert W. Domvile to charge the fee-simple with payment of the costs already mentioned; and the deed contains a declaration that Thomas Falls and Hubert Graves Archer, or other the trustees or trustee for the time being thereof, were thereby appointed to be trustees or trustee thereof for all the purposes of the Settled Land Acts, 1882–1890, and also for all the purposes of section 42 of the Conveyancing and Law of Property Act, 1881.

The last deed in the title is one of the 30th October, 1906, by which Herbert W. Domvile, in exercise of his restored power, appointed a jointure to Miss Harriett Sarah Beresford, to whom he was about to be married.

So the case stands; and the contention of the vendor is that the receipt of the trustees of the will of 1847, either as such or by being (as a concession) appointed trustees of that will for the purposes of the Settled Land Acts, is sufficient to give a good discharge from the portions of £8000, created by the settlement of 1895, and the jointure of Compton Domvile's widow, and the sums raisable under the trusts of the term of 1000 years created by the deed of 1904, which term came into existence immediately.

I am not satisfied that any case has been yet decided which establishes such a result; and, not being so satisfied, I think the requisition of the vendor to have trustees appointed of the compound settlement should have been complied with. To an ordinary mind, the refusal to comply with it appears unreasonable, even if the case were only doubtful; but, having considered all the authorities referred to by Mr. Walker in his elaborate argument, I am bound to say that I think the vendor is entitled to have his requisition complied with.

In my opinion, the judgment of Chitty, L.J., in *Mundy and Roper's Contract* (1), contains the clearest reading on the powers of a tenant for life under the Settled Land Acts which the numerous cases furnish; and I do not share the doubts of Vaughan Williams, L.J., in the same case.

I think it is clear that where a jointure and portions are created by a tenant for life under his powers, the tenant for life can sell; and the receipt of the trustees of the settlement will be a complete discharge from the jointure and portions. It is also clear that charges which subsist under the settlement will be so discharged. So it is clear that a tenant for life does not lose his powers by merely assigning his life estate.

But I put a case to Mr. Walker during the argument which I think tests the logical effect of the vendor's contention. If

(1) [1899] 1 Ch. at p. 288.

Appeal. 1908.

In re DOMVILE & CALLWELL'S CONTRACT.

The Lord Chancellor.

under the disentailing deed the lands had been limited to the use of the father and son, as joint tenants in fee-simple, and they under this ownership had by various deeds created charges on their lands, and subsequently under the same ownership had given back the lands to the first tenant for life as by restoration of his former life estate with the powers annexed, could he sell discharged from all the intervening charges? Mr. Walker said he could.

That may be so, but I am not aware of any case deciding it. If there is a reasonable doubt, the purchaser is entitled to say that a doubtful title should not be forced on him. In *Wimborne's Contract* (1), relied on as undistinguishable in favour of the vendor, the £1500 rentcharge had been released, and there was no charge paramount to the life estate. It was held that the power was exercisable though the vendor had granted his life estate to his son by the deed of 20th July, 1895.

In *Keck's Contract* (2) the jointures created by the first tenant for life were subsisting under the settlement. I cannot think that the particular charge I have referred to in this case can be treated as arising or subsisting under the will alone. The life estate was restored to him after charges had been created and were subsisting under the settlements of 1895 and 1904; and I think, to obtain a good receipt from these charges, trustees must be appointed of the compound settlement created by the will and those settlements. The tenant for life is to be treated *pro tanto* as a tenant for life under a later instrument. *Re Spencer's Settled Estates* (3) furnishes an analogous case. The case of the *Marquis of Ailesbury and Lord Iveagh* (4), where the trustees were appointed trustees of the settlement created by the series of instruments, also seems to me an authority in the same direction.

It is very possible, as stated in Wolstenholme's text-book, that there are cases in which trustees were appointed of a compound settlement though it might not have been necessary; but that cases exist in which such appointment is necessary is admitted.

It is somewhat remarkable that by the deed of December, 1891, the trustees are made trustees of that settlement for the purposes

(1) [1904] 1 Ch. 537.
(2) [1898] 1 Ch. 617.
(3) [1903] 1 Ch. 75.
(4) [1893] 2 Ch. 345.

of the Settled Land Acts; and by the deed of 1904, Falls and Archer are made trustees of it for the purposes of the Settled Land Acts. It will neither be troublesome nor expensive to re-christen them by an order now.

I think the appeal should be allowed with costs here and below, and an order made to appoint trustees of the compound settlement in the terms of the purchaser's requisitions.

FITZGIBBON, L.J. :—

The Settled Land Act, 1882, sect. 2 (1), defines "a settlement," or "the settlement," in the Act referred to, in the following words:—"Any . . . instrument, or *any number of instruments* under or by virtue of which . . . any land . . . stands *for the time being* limited to or in trust for any persons by way of succession." Sect. 2 (3) defines "settled land" as "land . . . which is the subject of a settlement." Sect. 2 (8) defines "trustees of the settlement" (where there are not trustees with power of sale, or of consent to or approval of the exercise of such a power of sale) as "*the persons*, if any, for the time being, who are *by the settlement* declared to be trustees thereof for purposes of this Act."

In my opinion, the question whether the existing settlement of any land consists of one instrument or of a "number of instruments," must be determined by reference to the purport and effect of the instruments under which the land *for the time being* stands limited, and the crucial time is the date of the contract for sale.

Where "the settlement" consists of more instruments than one, it is conveniently referred to in the cases as a "compound settlement," and wherever the settlement is compound a good receipt for the purchase-money cannot be given unless trustees of that settlement exist, or are appointed as such.

I am clearly of opinion that, in this case, at the date of the contract of sale, the land agreed to be sold was limited by more instruments than one for the purposes of the Settled Land Act, namely by—(1) such provisions of the will of Compton Charles Domvile as, for the time being, were still operative, viz., the limitation of the vendor's "restored" life estate, with its power of jointuring exercised by the deed of October 30, 1906; and (2) the provisions which, under the powers of the disentailing deed,

Appeal. 1908. *In re* DOMVILE & CALLWELL'S CONTRACT. Fitz Gibbon, L.J.

had limited other and different estates and interests in the same "settled land," which provisions were "for the time being" in existence. The existing provisions as to the reduced portions for younger children are notable instances of such provisions. The rentcharge for the vendor's daughter-in-law, during his own life, seems to raise a further difficulty, and I am not to be taken as deciding that her concurrence in the conveyance is not necessary; but I am clearly of opinion that the portions of £8000 are not charges that arise *under the will*, and, therefore, that the appointment or concurrence of trustees of *the deed of* 1895 *under which they do arise*, is necessary in order to give a good receipt for the purchase-money, because that deed is just as much part of the existing settlement as is the will. The provisions for raising money under the term for 1000 years for the demesne wall, and for costs, supply an additional reason for holding this to be a case of a "compound settlement." None of those provisions are, in any sense, "derivative" from the will.

But even if the question were only doubtful, it would, in my opinion, be the duty of the Court "to give the benefit of the doubt" to the purchaser. In a case such as this, where there is no doubt as to the jurisdiction, and no difficulty in exercising it, the Court should remove the doubt, rather than let the vendor "stand on his strict rights," with the result of forcing the purchaser to pay his money on a receipt of which the validity or sufficiency might afterwards be challenged, either by some claimant under the settlement, or by some critical purchaser, neither of whom could be bound by the decision which is now under appeal.

In my opinion, the appeal should be allowed, with costs here and below, and the vendor should be required to take the proper steps to obtain the concurrence or the appointment of trustees of the compound settlement. Without challenging *the decision* in *Wimborne and Browne's Contract* (1), I regard *Tibbits'* (2), *Meade's* (3), *Ailesbury's* (4), and *Mundy and Roper's Cases* (5) as instances in which the prudence, expediency, and justice of treating settlements as compound have been recognized, and they are precedents for allowing the appeal.

(1) [1904] 1 Ch. 537. (2) [1897] 2 Ch. 149. (3) [1897] 1 I. R. 121.
(4) [1893] 2 Ch. 345. (5) [1899] 1 Ch. 275.

Appeal. 1908.

In re DOMVILE & CALLWELL'S CONTRACT.

HOLMES, L.J.:—

This is an appeal from an order made on a purchaser's summons, seeking a declaration that the purchaser's objections to title have not been sufficiently answered, and that good title has not been shown.

The vendor, Major Herbert Domvile, is tenant for life, under the will of his uncle, Compton Charles Domvile, dated the 20th February, 1847, and he has agreed to sell, for the sum of £10,000, portion of the lands of which he is thus tenant for life, under the powers conferred by the Settled Land Acts, 1882–1890.

On the death of the testator's widow, in July, 1891, the vendor's tenancy for life vested in possession, with remainder to his first and other sons in tail, and with power of jointuring a wife, and charging portions for younger children; nor has it been denied in the argument in this Court that, notwithstanding subsequent deeds to which I shall presently refer, he has, as such tenant for life, power to sell. The difficulty that has arisen between the vendor and purchaser relates to the existence or appointment of trustees for the purposes of the Settled Land Acts, and is of a kind that might have been arranged by the parties without litigation or expense.

I have never been able to understand the tenacity with which conveyancers insist on matters of no real importance; but I suppose they are influenced by some point of honour or principle, which my mind is incapable of appreciating.

The first requisition on title made by the purchaser was that there must be appointed by the Court, for the purposes of the Settled Land Acts, trustees of a compound settlement created by the will of Compton Charles Domvile, and the subsequent deeds already mentioned.

The reply to this requisition was that what was asked for is unnecessary, inasmuch as the vendor is tenant for his life, under the settlement constituted by the will, and that trustees thereof, for the purposes of the Acts, are in existence. Further correspondence followed; and in the end the vendor consented to have trustees of the will, for the aforesaid purposes, appointed by the Court at his own expense. This, I believe, has since been done; but although the same persons might have been appointed trustees

Appeal. 1908.

In re Domvile & Callwell's Contract.

Holmes, L.J.

of the compound settlement without any additional cost, the vendor declined to take this course, and hence the present litigation.

To understand the point in controversy, it is necessary to follow the title subsequent to the date at which Major Domvile became tenant for life in possession. By a disentailing deed of the 9th December, 1891, he and his eldest son, Compton C. Domvile, conveyed the lands to trustees, to such uses as they should jointly appoint; and in default of appointment, upon the uses and trusts, and subject to the powers and provisions, existing at the date of the disentailing deed. By means of this joint power of appointment the father and son, in the year 1895, carried out an agreement made between them, by which there was substituted for the power of providing portions for younger children, given to Major Domvile by the will, a new power of providing such portions. The effect of this was to release the lands from all provisions for younger children in the will, and instead thereof to give the father a power to charge portions for them more limited in extent, and secured by a new term of years; but in other respects the uses, trusts, and powers of the will and disentailing deed were restored and confirmed. On the 6th October, 1904, a re-settlement was executed by Major Domvile and his eldest son, by which the lands were charged with a yearly rentcharge of £200 in favour of the son during the joint lives of himself and his father, and with a further yearly rentcharge of the same amount in favour of the son's wife, if he should die in her lifetime, during the joint lives of her father-in-law and herself; and subject thereto, to Major Domvile, during his life, in restoration of his former life estate under the will, and so that the power of jointuring a future wife, given him thereby, should also be restored and remain in full force. Subject as aforesaid, and also subject to a contingent jointure rentcharge in favour of Major Domvile's first wife, who was then living, and to the provision for younger children under the deed of 1895, the lands were granted to the use of the son for life, with remainders in strict settlement, and with all the provisions and powers usual in such instruments. I understand that these three deeds, together with the will, form the compound settlement mentioned in the purchaser's requisition;

and the question in dispute is, whether the vendor can insist that the will alone is the settlement within the meaning of the Acts, and that therefore the trustees thereof are the proper persons to receive the prescribed notices, and to give a discharge for the purchase-money.

It is, I think, clear that the vendor is not only tenant for life under the will, but that he also retains the jointuring power given him thereby—a power which he has exercised in favour of his second wife, by deed of the 30th October, 1906.

It is, however, equally clear that all the other limitations, powers, and provisions of the will relating to the lands agreed to be sold are gone, and we must look to the deeds of 1891, 1895, and 1904 to find the estates and interests that have taken their place.

In this state of things Mr. Justice Barton held in favour of the vendor's contention, on the authority of *Lord Wimborne and Browne's Contract* (1). I have carefully read the report of this case, and I am disposed to agree with the Judge that it is, in principle, indistinguishable from the present. At the same time, it is only one of many authorities which it is difficult to reconcile, and from which it is not easy to extract any principle. Among the cases that have been quoted there are *In re Marquis of Ailesbury* (2) (in which, I think, the expression "compound settlement" occurs for the first time); *Meade's Settled Estates* (3); *Tibbits' Settled Estates* (4); *Keck and Hart's Contract* (5); *DuCane and Nettlefold's Contract* (6); *Mundy and Roper's Contract* (7); and *Cornwallis-West and Munro's Contract* (8). All these and other authorities I have read with reasonable care, but with little profit or satisfaction. Different Judges have come to different conclusions; distinctions are drawn which it is hard to follow; and in most of them trustees of a compound settlement were, as a matter of fact, appointed, whether it was necessary to do so or not. They have led Mr. Justice Barton to hold that in the present case it is possible to regard either the will alone, or the will together with

(1) [1904] 1 Ch. 537.
(2) [1893] 2 Ch. 345.
(3) [1897] 1 I. R. 121.
(4) [1897] 2 Ch. 149.
(5) [1898] 1 Ch. 617.
(6) [1898] 2 Ch. 96, 108.
(7) [1899] 1 Ch. 275.
(8) [1903] 2 Ch. 150.

Appeal. 1908.

In re Domville & Callwell's Contract.

Holmes, L.J.

the other deeds, as a settlement within the meaning of the Acts. In these circumstances I should have been disposed to rule, if I had been in his place, that the purchaser was entitled to have trustees of the compound settlement appointed, on the ground that such trustees would certainly be sufficient; while there would be at least some doubt of the sufficiency of persons who were appointed trustees of the will alone. The Judge, however, thought that where a vendor stands on his strict rights, the Court is bound to decide the point. He therefore addressed himself to the solution of the difficulty, and I shall try to do likewise, with the assistance of the language of the Legislature, which, we are told, is not to be regarded from a technical point of view. Turning to the 2nd section of the Act of 1882, which defines what is a settlement for the purposes of the Act, I find that such a settlement may amount to one instrument, or any number of instruments, under or by virtue of which instrument or instruments any land stands for the time being limited to, or in trust for, any persons by way of succession.

Now, if I were to ask an intelligent man, be he lawyer or layman, whether the land in this case stands for the time being limited to persons by way of succession, under the will alone, or under the will and the three subsequent deeds, he would answer without hesitation, under both the will and deeds.

This test is so simple and obvious that one is disposed to doubt its value; and I am sure pages could be written to show its fallacy. But I adopt it for want of a better, and I therefore hold that this is a case of a compound settlement.

Solicitors for the vendor: *Falls & Co.*

Solicitors for the purchasers: *Montgomery & Chaytor.*

R. ST. J. C.

COLLEN BROTHERS *v.* THE COUNTY COUNCIL OF THE COUNTY OF DUBLIN AND OTHERS.

Ross, J.
1908.
July 20, 21, 30.

Mistake—Rectification—Local Government—Limitation of time for payment of debt—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37, *s.* 51 (7)).

Plaintiffs, building contractors, tendered to the defendants for the building of an asylum. The defendants, deeming the cost too high, directed their quantity surveyors to prepare bills of reductions, showing reduced works and reduced prices. Owing to a reference letter being misplaced, there was an error in the total cost as appearing from the bills of reductions, the total sum being put at £830 less than the correct figure. The plaintiffs, in the mistaken belief that the aggregate cost of the reduced works was as stated in the reduced bills of quantities, tendered for one bulk sum, which tender was accepted by the defendants, and the works completed.

In an action for rectification, and recovery of the sum due on the rectified contract:—

Held, that the mistake could be rectified so as to carry out the real intention of the parties.

The Local Government (Ireland) Act, 1898, sect. 51 (7), enacts that every debt, claim, or demand, which is directly or indirectly payable out of the poor rate, shall be paid within the half-year in which the same was incurred or became due, or within three months after the expiration of such half-year, but not afterwards.

The plaintiffs, misled by incorrect figures in certain reduced bills of quantities, tendered, in 1896, to the Commissioners for general control and superintendence and directing the erection of asylums for the lunatic poor in Ireland, for certain works connected with the building of an asylum. The tender was accepted by the Commissioners, all whose rights, powers, and liabilities, on the passing of the Local Government (Ireland) Act, 1898, became vested in the defendants. The works were completed, and the architect's certificate obtained prior to 1905. The plaintiffs, in April, 1906, commenced an action for rectification and recovery of the sum due on the rectified contract:—

Held, that the word "due" in section 51 (7) of the Local Government Act, 1898, means "recoverable by any legal process," and that the action was barred by the application of the said section.

Ross, J.
1908.
COLLEN
v.
DUBLIN
Co. COUNCIL.

ACTION brought by the plaintiffs, a firm of building contractors, claiming to have a deed bearing date 29th August, 1896, and made between the plaintiffs and the Commissioners for general control and superintendence and directing the erection, establishment, and regulation of asylums for the lunatic poor in Ireland, rectified, by having the contract price for the erection of the Richmond Lunatic Asylum at Portrane raised from £167,000 to £167,830.

The statement of claim stated, *inter alia* :—

1. In the year 1896 the plaintiffs tendered for certain works connected with the building of an asylum for the lunatic poor at Portrane in connexion with the Richmond District Asylum. These works consisted of several sections, the male and female wards for each separate class of inmate constituting a separate sub-section. Plaintiffs' tenders for the several sections were based upon bills of quantities furnished under the orders and instructions of the architect to the Commissioners of general control and superintendence and directing the erection, establishment, and regulation of asylums for the lunatic poor in Ireland.

2. These bills of quantities were priced by the plaintiffs, and the aggregate amount for all the sections and sub-sections was £199,700.

3. The Commissioners, coming to the conclusion that the said sum was more than they deemed advisable to spend on the said asylum, directed their architect and quantity surveyor to prepare bills of reduction. These bills of reduction were prepared by the architect and quantity surveyors, and the items therein were priced by the plaintiffs, the total price for each section and sub-section being brought out as separate items. From the costs of the several sections and sub-sections as set forth in the bills of reductions it appeared that the aggregate cost of the said works would be £169,556 9*s.* 8*d.*

4. Upon the faith of the representation so made, and in the belief that the entire of the reduced works so priced could be executed as separate items for an aggregate sum of £169,556 9*s.* 8*d.*, the plaintiffs, in consideration of obtaining the entire contract,

tendered to construct all the said sections and sub-sections for one bulk sum of £167,000.

5. This tender was by deed bearing date 29th August 1896, duly accepted by the Commissioners; and the works were begun and carried on by the plaintiffs to the satisfaction of the architect.

6. In the year 1900, the plaintiffs, in making up their accounts of the work actually done to date, with a view of obtaining the architect's certificate, for the first time became aware that there must have been some error in the total cost as appearing from the bills of reduction; and it was, after a very prolonged and careful investigation, discovered that the source of the error was the misplacing of a reference letter by a clerical error of the quantity surveyor in the summary of the prices.

7. On the passing of the Local Government Act, 1898, all the rights, powers, and liabilities of the Commissioners became vested in the defendants.

[The following paragraphs refer to the said error, which is fully explained in the judgment of Ross, J. :—]

14. The plaintiffs say that at the time the said contract was entered into they were not aware of the said error, and they entered into the said contract to complete the entire of the works for a bulk sum of £167,000 under a mistake, it being based on the belief that the aggregate cost reduced as aforesaid was only £169,556 9*s.* 8*d.*, whereas in fact it was £170,386 9*s.* 8*d.*

The plaintiffs claimed :—1. Rectification of the deed of 29th August, 1896. 2. A declaration that the sum of £830 was justly due and owing to the plaintiffs on foot of the works executed by them.

The defendants by their statement of defence denied the allegations in the statement of claim, and put in a special defence as follows :—

5. The defendants further say that the claim of the plaintiffs for the sum of £830 is a debt or demand which is directly or indirectly payable out of the poor rate, and became due after the 12th August, 1898, and before 16th February, 1905; and, even if the said contract of 29th August, 1896, were rectified in the manner sought for by the plaintiffs, the said sum of £830 would not be legally payable by the defendants, having regard to the

Ross, J. 1908. COLLEN v. DUBLIN CO. COUNCIL.

provisions of the Local Government Act, 1898, section 51, sub-section 7 (1).

The Right Hon. J. H. Campbell, K.C. (with him *S. L. Brown, K.C.*, and *Hanna*), for the plaintiffs :—

This is a case of mutual mistake which the Court has power to rectify : *Neill* v. *Midland Railway Company* (2), followed in *Hegarty* v. *Coleraine Urban District Council* (3). As regards the Local Government Act, 1898, the plaintiffs were not in a position to sue, and the money does not become due until the contract is rectified. The section only refers to an ascertained demand or debt, and not to one which has to stand over for an arbitration, or for the contract to be rectified : *Waterford County Council* v. *Dungarvan Urban District Council* (4).

T. S. M'Cann, K.C. (with him *Matheson, K.C.*, and *P. O'C. White*), for the defendants :—

I. Rectification does not apply to a case of this sort at all. "Courts of equity do not rectify contracts ; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified ; and that such contract is inaccurately represented in the instrument " : *Mackenzie* v. *Coulson* (5). No doubt the plaintiffs were misled by the figures, but the only contract between the parties was one to do the work for a bulk sum, and there is no remedy by rectification. Rectification only applies to a case

(1) Section 51 (7) of the Local Government (Ireland) Act, 1898, is as follows :—"Every debt, claim, or demand which is directly or indirectly payable out of the poor rate, and becomes due after the passing of this Act, shall be paid within the half-year (whether the first or second six months of the local financial year) in which the same was incurred or became due, or within three months after the expiration of such half-year, and not afterwards : Provided that the Local Government Board may, if they think fit, extend the time within which such payment may be made to a time not exceeding twelve months from the date at which the same was incurred or became due."

(2) 17 W. R. 871 ; 20 L. T. (N. S.) [864.

(3) Not reported.

(4) 37 I. L. T. R. 175.

(5) L. R. 8 Eq. 368, at p. 375.

where you want to make the instrument correspond to the contract really entered into by the parties.

II. Local bodies must pay for current liabilities by current taxes: *The Queen* v. *Guardians of Stepney Union* (1); *R.* v. *Monaghan Urban District Council* (2). There is here a debt due all through. On the plaintiffs' case there was a contract existing all the time; all that was required was evidence, to be supplied by rectification. Is the mere absence of such evidence to be taken as negativing the existence of the debt? *Midland Railway Co.* v. *Edmonton Union* (3).

Matheson, K.C.:—

The bill of quantities was only for the convenience of the contractor. The plaintiffs were aware of the notice that the Board was not bound by mistakes in the bills of quantities which were not incorporated in the contract, nor part of the contract. It is impossible to put the parties back in their former position. If the mistake had been rectified, and plaintiffs had tendered for £167,830, their tender might not have been accepted.

S. L. Brown. K.C., in reply.

Ross, J.:— July 30.

This action is brought to have a deed of 29th August, 1896, rectified. The plaintiffs are contractors who have erected Portrane Asylum. The parties to the deed are the plaintiffs and the Commissioners of General Control. Under the Local Government Act, 1898, the rights, powers, and liabilities of the Commissioners became vested in the various public bodies who are the defendants in this action. The ground of the rectification claimed is mutual mistake.

It is necessary to examine from the beginning what occurred. The plans and specifications were prepared by Mr. Ashlin, architect to the Board. Messrs. Patterson and Kempster, who are building surveyors, made out bills of quantities. The works specified in the bills of quantities were divided into sections and

(1) L. R. 9 Q. B. 383. (2) 2 N. I. J. R. 279. (3) [1895] A. C. 485.

Ross, J. 1908.

COLLEN v. DUBLIN CO. COUNCIL.

sub-sections. The male and female wards for each separate class of inmate constituted a separate sub-section. The Board then advertised for tenders. The tenders were required to be on a form prepared by the Board. The Board stated in the advertisement that they did not guarantee the accuracy of the quantities. The form of the tender required that the work should be priced by section and sub-section set out in a general summary. It further provided that the Board should be at liberty to select any portions of the works of not less value than £50,000, to be proceeded with at once, and to postpone indefinitely or abandon the remaining portion of the works. The tender further provided that in event of the whole of the works being contracted for and proceeded with at once the contractor was required to state what reduction per cent. he was willing to make for the entire works.

The bills of quantities were priced by the plaintiffs for all the sections and sub-sections. The total amount of their prices when added was £199,000. The Commissioners, being of opinion that the amounts appearing were more than it was advisable to spend on the Asylum, directed their quantity surveyors to prepare a bill of reductions. The object of the bill of reductions was by thinning walls and lightening floors, and with suitable substitutionary work, to lessen the expense. The various items of the bill of reductions were then priced by the plaintiffs. The net aggregate of the reductions being deducted from the aggregate prices appearing in the original bill of quantities left a sum of £169,556 9*s.* 8*d.* On this basis the tender was made, and the contractors stipulated that if the Board accepted the entire tender for all the works to be proceeded with at once, they would make a deduction of 1½ per cent. upon the net estimate for the work. This deduction would amount roughly to £2550. Accordingly, for the sake of even numbers, from £169,556 9*s.* 8*d.* the sum deducted was £2556 9*s.* 8*d.*, *i.e.* £6 9*s.* 8*d.* further, which left £167,000, the amount of the tender which was accepted.

The work went on, and it was only in the year 1900, when the plaintiffs were making up their accounts, that the error was discovered. The price of the male section in the original priced bill of quantities was less than that of the female section. A

reference-letter in the summary was misplaced. The effect of this was that the price of the female section before the reduction was represented as the same as the male section before the reduction. This made a difference of £357.

It is an error not very easy to discover, and requires some examination. In the bill of reductions the superstructure is dealt with first. The reductions are £1678 2*s.* 3*d.* The extra works necessary in consequence of the change are £804 17*s.* 6*d.* The net credit to be deducted from the original estimate is £873 4*s.* 9*d.* This last sum being deducted from £12,031 leaves a balance of £11,157 15*s.* 3*d.*; and it is opposite this figure the misleading reference-letter is put. The deductions of the substructure are dealt with later. Now, instead of £12,031 for the female section, the figure should have been £12,388; and after the net reduction in respect of the superstructure the figures should have been £11,514 15*s.* 3*d.* instead of £11,157 15*s.* 3*d.* The result was that the contractors lost £357. I need not go into the particulars of the three other items. The mistakes all occurred in the same way. They are all acknowledged and admitted mistakes. I do not think the notification in the advertisement, that the Board did not guarantee the accuracy of the quantities, affects the kind of mistake that occurred.

Now, we cannot deal with the contract alone. We must deal with the tender. We cannot deal with the tender alone. We must consider the priced section; for it was a term of the contract that the Board might only select sections priced at £50,000. The details must have been present to the minds of both the parties. The defendants say this is a contract to do the bulk work for £167,000. If the plaintiffs made any mistake, they took the risk of it, and must bear the consequences. That is not my view of the matter. The intention of the parties, when analysed, was that the tender for the original amount of the priced section, less the amount of the priced bill of reductions, should be accepted. The sum of £167,000 was erroneously taken to be the figure, and erroneously embodied in the contract. In what respect does this differ from an error in adding the figures in the summary? In no way.

The meaning of rectification of a written instrument is to carry out the real intention of the parties which has been

Ross, J. 1908.

COLLEN v. DUBLIN CO. COUNCIL.

erroneously expressed. That is what the plaintiffs ask me to do. There are all kinds of technical difficulties. How can you rectify the deed without rectifying the tender? How can you alter an accepted tender? These technicalities ought not to be allowed to stand in the way of a Court of Equity, whose primary duty is to struggle to enforce fair dealing between man and man, if it can be done without violating some matter of principle.

But at last I am brought face to face with a difficulty which I regret to say I do not at present see how the plaintiffs can get over. It is set out in paragraph 5 of the statement of defence, where sub-sect. 7 of sect. 51 of the Local Government Act is pleaded. The plaintiffs' claim is, in the words of the section, a debt, a claim, or a demand, directly or indirectly payable out of the poor rate; and it must be paid within the half-year in which the same was incurred or became due, or within three months after the expiration of such half-year and not afterwards. Then follows in the same section a proviso giving power to the Local Government Board to extend the time for a period not exceeding twelve months. Now, what is the meaning of the expression "became due"?

The plaintiffs contend that these words refer to such debts and demands as are recoverable at law, and do not require a declaration in a Court of Equity. I fear the proposition cannot be maintained. The debt is due in equity before the declaration is made. If the debt were not due, no declaration could be made. The declaration in respect of the rectification of the deed, followed by an order to pay, both of which are obtained in one action, constitute the means by which the debt is recovered. The word "due" cannot be limited in the manner suggested. I feel constrained to hold that the word "due" implies a debt recoverable by any legal process. If the plaintiffs are right, a person entitled to equitable relief could extend the time for enforcing his demand, notwithstanding this stringent enactment. That cannot be the meaning of the section. It is right to say the section does not seem intended to deal with the case of permanent works constructed under the borrowing powers; but I do not see how to escape from the express words used. I know the plaintiffs were misled by the expectation that their claim could be dealt with by the arbitrator, or that something would be done by the Local Government

Board. It was a most reasonable expectation, and they were by no means to blame. As I see no way at present of getting over the difficulty raised by the section, I must, with great regret, dismiss the action. Under the circumstances I shall certainly dismiss it without costs.

Ross, J.
1908.
COLLEN
v.
DUBLIN
Co. COUNCIL.

I venture to make a suggestion to the plaintiffs, the defendants, and the Local Government Board. This money is honestly due. If it were the case of an individual member of the defendants' Board, I am sure he would pay it as an honourable man. As soon as notice of appeal is served let the matter be compromised by payment of half the sum claimed. I think this would meet the real justice of the case; and I take the liberty of making the suggestion in the interest of fair play (1).

Solicitor for the plaintiffs: *Matthew Good.*
Solicitor for the defendants: *William Dillon.*

D. M. S.

KING-HARMAN *v.* CAYLEY.

M. R.
1908.
June 24, 30.

Administration of estate—Charges as to management against receiver—Judge of Chancery Division—Receiver Judge—Tribunal for investigation of charges—Jurisdiction.

Application to vary an order, referring it to the Receiver-Judge to appoint a receiver, so far as such order related to the demesne and mansion-house and the shooting, and that a manager might be appointed over the same.

The estate was being administered in the Court of the Master of the Rolls. Most of the lands, except the demesne (which included a home-farm), had been sold. The order appointing a receiver was made by Monroe, J., on the 22nd June, 1893.

Certain charges as to the management of the demesne and home-farm were made against the receiver:—

Held, that the charges, if persisted in, should be made before the Receiver-Judge, and that the Rolls Court was not the proper tribunal for the investigation of the matter.

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(1) ...ppeal was lodged by the plaintiffs, but was afterwards withdrawn, ...ettled on the terms suggested by the learned Judge.

M. R. 1908.

KING-HARMAN v. CAYLEY.

APPLICATION that an order, referring it to the Receiver-Judge to appoint a receiver, might be varied, so far as said order related to the demesne and mansion-house of Rockingham, and the shootings attached thereto, by discharging the receiver over the same, and for an order that a manager might be appointed in place of a receiver over the same, and that it might be referred to Chambers to appoint a fit and proper person as such manager at a salary of not more than £250 a year.

By order of Judge Monroe, dated 22nd June, 1893, it was ordered that Major James F. Murphy be appointed receiver over, and to receive the rents and profits of, the estates in this matter in the counties of Roscommon, Longford, Sligo, and Queen's County. Affidavits were filed in support of the motion by the persons interested in the estates, alleging want of skill in management, and neglect against the receiver, Major Murphy, in respect of the demesne and home-farm, being portion of the estate which was in his hands, and managed by him for the preceding six years.

Affidavits in answer were filed by the receiver, denying the charges alleged against him.

Samuels, K.C. (with him *S. L. Brown, K.C.*, and *Craig Davidson*), for the minor plaintiff:—

At the time when this estate first came within the jurisdiction of the Court of Chancery there was an enormous amount of land in the hands of tenants, and the collection of rents was a very considerable business. It became necessary for the Court to appoint a receiver, and an order was made by this Court in the usual way, referring it to the Receiver-Judge to appoint a fit and proper person. The action of the Receiver-Judge in selecting a receiver and taking his accounts is purely ministerial: he has no authority in reference to the estate outside the strict terms of the order of reference. This Court does not delegate its discretion to any other Court in reference to the question how long a receiver should be continued, or whether a manager instead of a receiver should, if occasion arises, be appointed. Since the date of the order of reference the whole circumstances of the estate have altered. Practically all the tenanted land has been sold: there is very little

land now under the control of the Court save the demesne of Rockingham and the home-farm. There is no longer any need for a receiver, as there are practically no rents to be received. A manager is now required to farm and work the demesne. The demesne and home-farm were previously managed by the receiver as a small and incidental duty which was by comparison unimportant. Now they have become practically all that requires the management of the Court. The affidavits filed and accounts exhibited show that the management of this demesne and home farm under a receiver has not been advantageous to the interests of the minor. These affidavits also show that the demesne and home-farm might be properly worked so as to produce a profit to the estate. It is the duty of this Court, when matters are brought to its notice showing that property under its management is not profitably managed or could be better managed, to reconsider the whole scheme of management and if necessary alter it. This is a judicial duty: it involves the exercise of judicial discretion, and cannot be delegated, and it is a matter for the Court which ordered the appointment of a receiver, and not for the Land Judge, who merely carries out the direction in the order. It is submitted that the time has come when the order of reference should be recalled, and that a manager instead of a receiver should be appointed to manage the demesne and home-farm, and to be accountable in the chambers of this Court, and not before the Receiver-Judge. This Court has jurisdiction to appoint receivers and managers, and take their accounts.

Jellett, K.C., and *C. Murphy* (*Matheson, K.C.*, with them), for the receiver:—

This motion involves a review of the management of the estate by the receiver, under the direction of the Receiver-Judge. The system of management should not be attacked in this Court. If the receiver has been guilty of mismanagement, the Receiver-Judge is the proper tribunal. The receiver's accounts have been regularly passed, and all parties interested could attend. If the Court considers that the receiver should be discharged in the interests of the estate, he must of course submit; but he objects to be charged with mismanagement on this motion.

M. R. 1908.

KING-HARMAN v. CAYLEY.

June 30.

Serjeant O'Connor, K.C., and *John M'Mahon*, for Mrs. Stafford.

H. Wilson, K.C., for the trustees of the will of Colonel King-Harman.

THE MASTER OF THE ROLLS:—

Whatever the form of words in which this application is couched, it is in substance an application for the dismissal of Major Murphy as receiver.

The infant (by his father as next friend), and Mrs. Stafford, the mother of the infant, support this application. They are plainly discontented and dissatisfied with the management during the past six years of the portion of this estate which is in hands. The real grievance (if any there be) is the management of the home-farm.

I do not decide one way or the other the question whether Major Murphy is or is not a competent practical farmer, or whether it is or is not desirable that (in the altered circumstances of this estate) Major Murphy should be replaced by a practical competent farmer. Mr. Justice Ross, as Receiver-Judge, has always had jurisdiction to entertain any legitimate objection to the course of management, and to decide what that course of management should be. Major Murphy, like any other receiver under the control of Mr. Justice Ross, could not have done what he has done, namely, cease making grazing lettings from time to time, and take possession of the unlet lands, and work them by himself or his servants, without the knowledge of all parties to the suit and of all parties entitled to apply to the Receiver-Judge and his officials.

In my opinion, if there is any real foundation for the charges made against Major Murphy's management, the charges are capable of being taken before and investigated by the Receiver-Judge. It would be an impertinence for me to enter into any discussion as to whether the receiver was right or wrong, whether he is competent or not competent. If Major Murphy is not a competent practical farmer, if he has been incurring loss which is unnecessary, he should be relieved of his duties, and a competent man put in his place; and I have no doubt that Mr. Justice Ross has the fullest

jurisdiction to remove him and appoint a competent man in his place. But the charges must be made, and met, before the proper tribunal, viz., the Receiver-Judge.

The order directing the appointment of a receiver was made on 16th June, 1893, and that order was an order directing a reference to the Receiver-Judge to appoint a fit and proper person to be receiver over this estate, and that order still holds good.

It is true that a considerable portion of the estate has been sold, and that the receiver is no longer engaged in collecting rents on that portion of the estate; but he is still receiver over the Longford Estate, which has not been sold, and he is still receiver over the demesne and home-farm, and still has to discharge duties of management over the home-farm under the direction of the Receiver-Judge; and the proper course is to bring matters of this kind under the notice of the Receiver-Judge, to ascertain whether it is in the interest of the minor that this system, which has resulted in loss, ought now to be discontinued, or whether the system should be allowed to continue in operation.

There is no question of law upon which any case has been made for varying the order of my predecessor. A receiver is still necessary. If I had to frame any order, I should have to direct the appointment of a fit and proper person as "receiver." I might add the words "and manager," but I think the addition of those words would make no substantial difference.

I have no machinery in my Court or at my chambers for managing property. I could not give directions for the management of this farm of 1,000 acres.

Powers of management are inherent in a person appointed receiver over an estate of this kind, subject to the control and direction of the Receiver-Judge. The words "and manager" have no added force in the case of a receiver.

I give my fullest sanction and concurrence to the property being managed under the Receiver-Judge. If it appears to him that an independent receiver ought to be appointed, there is no reason why he should not appoint him. All I will do is to make no rule on this application, without prejudice to the plaintiffs making application before the Receiver-Judge, as they

M. R. 1908.

KING-HARMAN v. CAYLEY.

may be advised, in reference to the management of the home-farm and demesne; and I am perfectly satisfied that if Mr. Justice Ross comes to the conclusion that this farm ought to be worked by some one other than Major Murphy, and that Major Murphy should be discharged, it is quite open to him to discharge him from being receiver over the demesne and home-farm, but to continue him as receiver over the rest of the property. It is clearly open to him, if he considers it desirable, to appoint a practical working farmer (1).

Solicitor for minor plaintiff: *Norris Goddard.*
Solicitor for the trustees: *Clifford Lloyd.*
Solicitors for the receiver: *Milward Jones & Cameron.*
Solicitor for Mrs. Stafford: *Norris Goddard.*

R. W. L.

(1) An application to discharge the receiver was afterwards (July 6, 7, 1908) made to the Receiver-Judge, Mr. Justice Ross, who refused to discharge the receiver, but directed an investigation as to the best system to be adopted in the future in working the home-farm. Subsequently an offer was made by Dr. Stafford, the father of the infant, to take the home-farm on lease as a Court tenant, which offer was accepted by the Receiver-Judge, who retained the receiver, fixing his future remuneration having regard to the changed circumstances of the case.—D. M. S.

SWEETMAN *v.* BUTLER.

(1906. No. 1323.)

M. R.
1907.
March 31.
May 16.

Settlement—Construction—Marriage portion—Omission of trusts for wife—Estate by implication.

A father, in pursuance of an agreement to settle a perpetual annuity, charged on land to which he was entitled, upon his daughter and her intended husband as her marriage portion, settled the annuity upon trust after his own death for the husband during the joint lives of husband and wife, and, in the event of the wife predeceasing the husband and there being children, upon trust for the husband absolutely; and in the same event, if there were no children, upon trust for the husband for life, and after his death upon trust for such member of her own family as the wife should by will appoint, and in default of appointment upon trust for himself absolutely. There was no trust for the wife in the event of her surviving the husband, nor for children. The husband predeceased the wife, leaving children.

An originating summons was taken out by the wife, to which the devisees of the settlor and the children were made defendants, to determine to what estate or interest, if any, in the annuity she was entitled:—

Held, that upon the true construction of the settlement as a whole, the wife, by necessary implication, was, in the events which happened, entitled to a declaration that she was absolute owner of the annuity.

ADJOURNED SUMMONS.

This was an application by Mary Sweetman, widow of Walter Sweetman, to determine whether she was entitled to any and what interest in a perpetual annuity of £100 Irish, put in settlement on her marriage with Walter Sweetman by her father, Richard Butler. The facts of the case were as follows:—

By a settlement dated October 31st, 1859, and made between Walter Sweetman, of the first part, Richard Butler and Mary Butler (the plaintiff), daughter of the said Richard Butler, of the second part, Margaret Sweetman (mother of the said Walter Sweetman), of the third part, and Michael James Sweetman and Thomas Butler (trustees for the purposes thereinafter mentioned), of the fourth part, after reciting that Richard Butler was entitled

M. R. 1907.

SWEETMAN v. BUTLER.

under the will of his father, John Butler, to a perpetual annuity of £100 late Irish currency, charged upon the lands of Ballycarron and Grange, in the county of Tipperary, held under lease for lives renewable for ever, and that Richard Butler had, by mortgage dated April 17th, 1840, assigned the said annuity with other properties to Anthony Sayer and John Roche, to secure repayment of the sum of £2000, but which other properties were more than sufficient for the repayment of the said sum of £2000, independently of the said annuity, and that a marriage was intended to be had and solemnized between the said Walter Sweetman and Mary Butler, and that upon treaty for the said marriage it was agreed that certain lands in the county of Down, the property of the said Walter Sweetman, should be charged with a sum of £300 per annum, as a provision for the said Mary Butler in the event of her surviving her said intended husband, or other events thereinafter mentioned, and that the said Richard Butler agreed, as a marriage portion for his daughter, to settle the said annuity of £100 upon her and her said intended husband as thereinafter mentioned, reserving to himself a life estate therein, the said indenture witnessed that in consideration of the said intended marriage and of the agreement aforesaid and the assignment thereinafter made of the said annuity of £100, being the marriage portion of the said Mary Butler, and in order to make a provision for the said Mary Butler, his intended wife, and in consideration of the sum of ten shillings paid to him by the said Michael James Sweetman and Thomas Butler, the said Walter Sweetman conveyed the lands in the county of Down, thereinafter mentioned, to the said Michael Joseph Sweetman and Thomas Butler, to hold for a term of 500 years, to secure an annuity of £300 to the said Mary Butler during her life, in the event of the bankruptcy or death of the said Walter Sweetman, and subject thereto to the use of the said Walter Sweetman in fee-simple.

The said indenture further witnessed that the said Richard Butler, for and in consideration of the agreement aforesaid, and of the sum of ten shillings paid by the said Michael James Sweetman and Thomas Butler, granted to the said Michael James Sweetman and Thomas Butler, their executors, administrators, and assigns, the said annuity of £100 late Irish currency, equivalent to the

sum of £92 6s. 2d. present currency, and charged upon the thereinbefore mentioned lands of Ballycarron and Grange in the said county, to hold and receive the same unto the said Michael James Sweetman and Thomas Butler, their executors, administrators, and assigns for ever, upon trust to permit the said Richard Butler and his assigns to receive the said annuity during his life, and after his decease then upon trust to permit and suffer the said Walter Sweetman and his assigns to take and receive the said annuity during the joint lives of the said Walter Sweetman and Mary Butler, and after the decease of the said Mary Butler in the lifetime of the said Walter Sweetman, and that there should be children or a child living issue of the said marriage, then upon trust to convey the said annuity to the said Walter Sweetman, his heirs and assigns absolutely; but in the event of the death of the said Mary Butler in the lifetime of the said Walter Sweetman, and that there should be no children, grand-children, or other issue of the said intended marriage then living, upon trust for the use of the said Walter Sweetman for the term of his natural life, and after his decease upon trust for such person, one or more of her own family, as the said Mary Butler should notwithstanding her coverture by her last will appoint; and on failure of such appointment to and for the use of the said Richard Butler, his heirs and assigns, for ever.

The settlement contained a covenant by Richard Butler to discharge the mortgage debt of £2000, a provision that each trustee should only be answerable for his own acts, a covenant for further assurance by Walter Sweetman, and a power of appointment of new trustees. There were no trusts of the annuity declared in the event which happened, namely, of Walter Sweetman predeceasing Mary Butler, and leaving children, nor was there any power given to him or her to appoint it to the children of the marriage.

By an indenture of July 9th, 1883, the annuity was released from the mortgage of £2000. Walter Sweetman died on the 24th June, 1905, leaving the plaintiff, Mary Sweetman, and four children surviving, namely, the defendants, Walter Sweetman, Michael James Sweetman, J. F. Sweetman, and Margaret G. Sweetman, having made his will, dated April 15th, 1901,

M. R. 1907.

SWEETMAN v. BUTLER.

whereby he left the said annuity to his son Michael James Sweetman, in the event of his wife dying before him without having made any will, declaring that under such circumstances it would be in his power to devise it; and probate of his will was granted on July 19th, 1905, to his son, Michael James Sweetman, one of the executors therein named. Richard Butler died on March 11th, 1870, having made his will, dated August 30th, 1867, and thereby, after bequeathing certain cash, bills, bonds, and notes, arrears of rent, cattle, farming stock, and other chattels, he devised and bequeathed the residue of his real and personal estate to his son-in-law the said Walter Sweetman, upon trust to raise thereout by sale, mortgage, or otherwise as he should think fit, a sum of £1500 for each of his daughters, and until payment of the same to pay his said daughters interest on the same at the rate of 5 per cent. per annum from his decease, and subject thereto in trust for his three sons, Richard, Thomas, and William, their heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants. The said will was proved on May 20th, 1870, by the said Thomas Butler, one of the executors in the will named.

The said Richard Butler (one of the residuary devisees and legatees mentioned in the said will of the last-mentioned testator, Richard Butler) died on August 12th, 1902, having by his will, dated July 11th, 1882, left to his nephew, Richard Butler, the second son of his said brother, Thomas, his share in the reversionary interest in certain lands of Sunville in the county of Tipperary, not included in the testator's marriage settlement, and also in other landed property to which he might be entitled, and which was not included in his marriage settlement. The said will was proved on September 13th, 1902, by Mary Anne Butler, the sole executrix in the said will named. The said annuity of £100 was not included in any settlement, save that made on the marriage of the said William Sweetman and Mary Butler.

Doubts having arisen as to the construction of the said settlement of October 31st, 1859, and the effect of the said wills of the said Richard Butler and Walter Sweetman, so far as they respectively affected or purported to affect the said annuity, an originating summons was taken out by Mary Sweetman to have the following questions determined by the Court:—

1. Whether the devise of the said annuity of £100 late currency contained in the said will of the said Walter Sweetman is valid?

2. Whether, in the events which have happened, the said Mary Sweetman is under and by virtue of the said marriage settlement entitled to any, and what, estate or interest in the said annuity?

3. Whether the children of the said Walter Sweetman and Mary Sweetman have, under or by virtue of the same settlement, any, and what, estate or interest in the same annuity?

4. Whether the defendants Thomas Butler, William Butler, and Richard Butler, second son of the said Thomas Butler, have, under the wills of the said testators, Richard Butler, senior, and Richard Butler, junior, any, and what, estates or interests in the same annuity?

The defendants to the summons were Thomas Butler, William Butler, Richard Butler, Walter Sweetman, Michael J. Sweetman, J. F. Sweetman, and Margaret Gertrude Sweetman.

Oulton, K.C., for the plaintiff:—

There are no trusts declared of the annuity in the event which has happened, namely, of Mrs. Sweetman surviving her husband, and leaving children. She is not even given a life interest in it. The Court should imply a trust for her, or for her and her children. In *Tunstall* v. *Trappes* (1) and *Allin* v. *Crawshay* (2) the settlement omitted to make any provision as to the interest of the trust fund during the life of the wife in the event of her surviving the husband, and the Court held that she took by implication a life interest in the trust fund. In *In re Daniel's Settlement Trusts* (3) a trust for daughters attaining twenty-one was implied in a post-nuptial settlement, as there was evidence on the face of the settlement of an intention to provide for children both male and female. In *Ex parte Rogers* (4) children were by implication held entitled

(1) 3 Sim. 312.
(2) 9 Hare, 382.
(3) 1 Ch. D. 375.
(4) 2 Madd. 449.

M. R. 1907.

SWEETMAN v. BUTLER.

to a legacy. If a marriage settlement is in an improper form, and not in accordance with the intention of the parties, the rule of the Court of Chancery is that the intention of the parties is to be carried out by putting the instrument into that form which will effectuate the intention: *Welman* v. *Welman* (1); that was a suit to rectify a settlement, but there is no necessity now to bring a suit for that purpose: *Bird's Trusts* (2); *In re De La Touche's Settlement* (3). In *Champ* v. *Champ* (4) the Court in an action of ejectment held that on the true construction of a marriage settlement there was an implied trust for the children of the marriage.

There is another line of authority which establishes the proposition that where a father on his daughter's marriage agrees to give his daughter a fortune, that fortune belongs to the daughter and her husband, save to the extent that their rights are controlled by settlement: *Ward* v. *Dyas* (5); *Dennehy* v. *Delany* (6); *Doyle* v. *Crean* (7). Here the father agrees, as a marriage portion, to settle the annuity on his daughter and her husband. The Court therefore will not hold that there is a resulting trust in favour of Richard Butler, the father, bearing in mind also that there is an express trust for him declared by the settlement in an event which did not happen, namely, in the event of Mrs. Sweetman not exercising the power of appointment by will in favour of her own family given to her in the event of her predeceasing her husband and leaving no children. An agreement to settle a portion on a daughter on her marriage is usually carried out by directing a settlement on her and her children: *Duckett* v. *Thompson* (8). Here, however, children are mentioned in the settlement, but they take nothing; it is submitted, therefore, that the Court should imply a trust of the annuity for Mrs. Sweetman absolutely.

Serjeant O'Connor, K.C., for the defendants Thomas Butler, William Butler, and Richard Butler:—

There was no implied gift here either to the wife or to the

(1) 15 Ch. D. 570.
(2) 3 Ch. D. 214.
(3) L. R. 10 Eq. 599.
(4) 30 L. R. Ir. 72.
(5) I.l. & G. temp. Sugden, 177.
(6) I. R. 10 Eq. 377.
(7) [1905] 1 I. R. 252.
(8) 11 L. R. Ir. 429.

children. The event which has happened is not provided for, and therefore there is a resulting trust for the settlor, Richard Butler. There was no intention to provide for the children by the settlement; for if the husband survived the wife and left children, it was expressly declared that they were to take nothing. The wife might survive and—1, have children; or 2, have no children—1 has happened. There was no intention by Richard Butler to give this annuity of £100 out and out to his daughter; she got a life annuity of £300 by the settlement from her husband. *Ward* v. *Dyas* (1), *Dennehy* v. *Delaney* (2), and *Doyle* v. *Crean* (3) are distinguishable. In those cases there was an intention to give the portion to the daughter out and out. Those cases were discussed in a revenue case, not yet reported (4). Gibson and Kenny, JJ., there did not approve of Sir Edward Sugden's phrase in *Ward* v. *Dyas* (1), "the father provides the fortune, and the child settles it," nor the ground of his decision that the daughter was to be regarded as the settlor, in whose favour there was a resulting trust. In *Tunstall* v. *Trappes* (5) the life interest was given, not implied. In *Allin* v. *Crawshay* (6) it was plain that the wife took a life interest. In *Champ* v. *Champ* (7) the Court held that the true construction of the settlement was that the children should take.

Oulton, K.C., in reply:—

The recitals in the settlement should control the *habendum*. Mrs. Sweetman should have a life estate at least.

May 16.

THE MASTER OF THE ROLLS:—

I am of opinion that on the true construction of the settlement there is an implied trust in favour of the applicant, Mary Sweetman. That the intention of the parties to the settlement was that the wife, in the event of her surviving her husband,

(1) Ll. & G. temp. Sugden, 177.
(2) I. R. 10 Eq. 377.
(3) [1905] 1 I. R. 252.
(4) *Atty.-Gen.* v. *Biggs*, K. B. D., February 11, 1907. Since reported—[1907] 2 I. R. 400.
(5) 3 Sim. 312.
(6) 9 Hare, 382.
(7) 30 L. R. Ir. 72.

M. R. 1907.

SWEETMAN v. BUTLER.

and having children, which event occurred, should retain this annuity of £100, Irish currency, no one reading the settlement could doubt. After reciting John Butler's will, the settlement proceeds—"And whereas a marriage is intended to be shortly had and solemnized between the said Walter Sweetman and Mary Butler, and upon treaty for the said marriage it was agreed that the said Margaret Sweetman should release the said townland and premises in the county of Down from the said annuity of £600, and that the same should be charged with a sum of £300 per annum as a provision for the said Mary Butler, in the event of her surviving her said intended husband, or other events hereinafter mentioned, and the said Richard Butler agreed as a marriage portion for his said daughter to settle the said annuity of £100, late currency, upon his said daughter as hereinafter mentioned, reserving to himself a life estate therein." This recital is most significant as regards the annuity of £100. There is, first, a declaration that Richard Butler ear-marked it as a marriage portion for his daughter; secondly, that it is to be settled upon his daughter and her intended husband; and thirdly, that the settlor reserves to himself a life estate therein. The deed goes on:—"In consideration of the said intended marriage, and of the agreement aforesaid, and said assignment hereinafter made of the said annuity of £100 herein, being the marriage portion of the said Mary Butler" (observe the repetition of the description "marriage portion"), "and in order to make provision for the said Mary Butler, his intended wife," Walter Sweetman demises his lands to trustees for a term of years to secure an annuity of £300 to Mary Butler, for her life, to become payable in case of the bankruptcy or insolvency of the said Walter Sweetman, or after his death, as the case may be; and, subject to the said term, the lands are limited to the use of Walter Sweetman absolutely. There is no provision made for children of the marriage. No estate in the lands is limited to child or children; no charge in favour of child or children is created; no power is conferred of raising portions by sale or mortgage of the lands. The question of providing for children (if any) is left, if I may adopt the phrase of Serjeant O'Connor, to the honour of the parents. So far I am with the learned Serjeant; but my view is that the scheme of the settlement goes a step

further. The obligation of honour is obvious, but debts of honour often remain unpaid for lack of means to pay them. The scheme of the settlement is to provide the parents with the means of fulfilling their honourable obligations. Subject to the annuity of £300 for the wife, the lands are settled on the husband; and he is at least placed in a position to make provision for his children thereout. That children were not outside the contemplation of the parties to the settlement is plain from what follows :—" And this indenture further witnesseth that the said Richard Butler doth grant to the said Michael James Sweetman and Thomas Butler the said annuity of £100, late currency, upon trust to permit the said Richard Butler to receive the said annuity during his life, and after his death upon trust to permit the said Walter Sweetman to receive the said annuity during the joint lives of Walter Sweetman and Mary Butler, and after the death of the said Mary Butler in the lifetime of the said Walter Sweetman, and that there shall be children or a child living, issue of the said intended marriage, then upon trust to convey and assign the said annuity to the said Walter Sweetman, his heirs and assigns, absolutely."

I pause for a moment to ask what is the meaning of that clause, if it is not that in the event of there being children the annuity is to go to Walter Sweetman, absolutely, to assist him in providing for them? There is no gift (express or implied) to the children, but the motive of the trust in favour of the husband is, to my mind, obviously indicated. Otherwise, why are children mentioned at all? " But in the event of the death of the said Mary Butler in the lifetime of the said Walter Sweetman, and that there shall be no children or grandchildren, or other issue of the said intended marriage then living, upon trust for the use of the said Walter Sweetman for life, and after his death upon trust for such person, one or more of her own family, as she the said Mary Butler shall notwithstanding her coverture by her last will direct and appoint, and in failure of such appointment to or for the use of the said Richard Butler his heirs and administrators and assigns for ever." If the contention put forward by the Butler family as to the meaning and effect of the clause were held to be correct, I apprehend that the observation of Sir Edward Sullivan, M.R.,

M. R. 1907.

SWEETMAN v. BUTLER.

in the case of *Dennehy* v. *Delany* (1), at page 384, would be hardly adequate to express my views as to this settlement. Mr. Oulton referred to the case of *Welman* v. *Welman* (2), decided by Malins, V.-C., for the purpose of showing the length to which a Court of Equity may go in rectifying a settlement. Malins, V.-C., says, at page 576—"Now will anyone say that this is a settlement that any human being ought to have been advised to make, or ought to have made? No man living ever saw such a settlement before, and I believe no man dead ever saw such a settlement. I want no authorities, I want no precedents, to satisfy me that such a thing as that cannot stand, because it is opposed to every principle of propriety, as well as to the honour and interest of the family; and I think, notwithstanding the zeal displayed by the counsel for this boy, that anything more prejudicial and detrimental to his interest can scarcely be conceived than that he should stand alone in possession of the whole of this family property, leaving every other member of it destitute." These are stirring words! I shall not attempt to plagiarize the passage, or to speak for mankind in general, living or dead. I shall content myself with saying that it is, in my judgment, difficult to believe that it was the intention of the parties to this settlement that, in case Mrs. Sweetman survived her husband, she should never become personally entitled to one penny of this annuity, and still more difficult to believe that, in case she survived, and had children living at her husband's death, she should not have power to give a fraction of the annuity to any child; most difficult of all to believe that it was the intention that the only event in which she was to be entitled to deal with the marriage portion was the event of her death in the lifetime of her husband, leaving neither child, grandchild, nor other issue then living, in which case the power of appointing the annuity (subject to the life estate of her husband) to one or more of her own family was conferred upon her. Her husband would have become entitled to the annuity absolutely if he survived her, and if there were children living at her death. He would thus have had power to benefit them. But if she survived her husband, she was to take nothing, and have no power of disposition whether there were or were not children of the marriage.

(1) I. R. 10 Eq. 377. (2) 15 Ch. D. 570.

I think that in principle the decision in *Champ* v. *Champ* (1) is applicable to this case. The decision in that case was, that there was a gift by implication in favour of the children of the marriage. Here, I think, there is a gift by implication to Mary Sweetman. I hold that the mother of the children was to take so as (at all events) to have power to benefit them, just as the father would have taken if he had survived his wife. This seems to me "necessary implication" having regard to the settlement as a whole, and the scheme disclosed by the terms of the document. The construction that there is a gift by implication to the children themselves I reject, as also the construction that there is a resulting trust in favour of Richard Butler. Holmes, L.J. (then Holmes, J.), in *Champ* v. *Champ* (1), at p. 81, says:—"An implied gift or trust does not import the introduction into a document of something omitted. The gift or trust is contained in the writing itself, although it is not expressly declared, but deduced *by reasonable inference*" (the italics are mine) "from the language used." Gibson, J., at p. 84, says—"The Court does not by its interpretation add or alter; it only elicits and displays the true meaning by comparison and reconcilement of the several parts of the instrument as a whole." It would not be possible to express in more apt language the functions of the Court or a Judge relating to the interesting questions of construction classed under the heading of "gifts by implication." The function of the Court of construction is not to import into deed or will matter omitted, not to add or alter, but to expound, to deduce by reasonable inference from the language of the instrument as a whole, to elicit and disclose, by comparison and reconcilement of the instrument as a whole, the true meaning and effect of the instrument itself. That is the principle I have endeavoured to act on in the present case. *Ward* v. *Dyas* (2) affords strong support to my view, though in some aspects it presents some difficulty. Gibson, J., in *Champ* v. *Champ* (1), thought that *Ward* v. *Dyas* (2) did not apply to such a deed as the deed under consideration in that case, and it no doubt is more applicable to a gift of a sum of money than to the grant of an annuity. But surely the principle applies to the facts of the

(1) 30 L. R. Ir. 72. (2) Ll. & G. temp. Sugden, 177.

M. R. 1907.

SWEETMAN v. BUTLER.

present case. The Lord Chancellor says in *Ward* v. *Dyas* (1) :—"There is undoubtedly a resulting trust, so far as the whole is not exhausted by the trusts of the settlement; but the question is, for whom? If you consider it merely as a dedication of the £500 to the uses of the settlement, then the trusts are for the wife for life, remainder to the issue, as the husband and wife or the survivor shall appoint, and in default of appointment to the issue equally; if there be no issue, there is a resulting trust for the father. But if this sum is considered as a marriage portion, it is clear that there is a resulting trust for the daughter to whom the portion is given. My opinion is, that the £500 is to be considered as a portion." I appreciate the difficulty in treating that case as a conclusive authority on the construction of the instrument before me; but the principle of the decision is, in my judgment, applicable. In the case to which I have already referred, *Dennehy* v. *Delany* (2), the Master of the Rolls (Sir E. Sullivan), alluding to *Ward* v. *Dyas* (1), says :—"It decides this proposition in which common sense and law run together, viz., that where a father on a daughter's marriage agrees to give his daughter a fortune, that fortune belongs to the daughter and her husband, save to the extent that their rights are controlled by the settlement." I decide that on the true construction of this settlement as a whole the wife by necessary implication is, in the events which have happened, entitled to a declaration that she is absolute owner of the annuity of £100 (Irish).

The Master of the Rolls made the following order :—

"THE JUDGE doth declare that, on the true construction of the settlement and of the said wills, and in the events that have happened, the plaintiff is, under or by virtue of the said settlement, entitled to an absolute estate or interest in the annuity of one hundred pounds, late currency, settled by the said settlement of the 31st day of October, one thousand eight hundred and fifty-nine, and that neither the defendants, Walter Sweetman, Michael James Sweetman, Reverend J. F. Sweetman, and Margaret G. Sweetman, nor the defendants, Thomas Butler, Richard Butler, and William Butler, take any interest in the said annuity of one hundred pounds

(1) Ll. & G. temp. Sugden, 177. (2) L. R. 10 Eq. 377.

late currency, either under the said settlement or any of the said wills."

M. R.
1907.

SWEETMAN
v.
BUTLER.

Solicitors for the plaintiff: *E. & G. Stapleton.*
Solicitors for the defendants: *Roche & Sons.*

W. L.

IN THE MATTER OF THE ESTATE OF WILLIAM WINTER AND ANOTHER.

Wylie, J.
1908.

April 28.
May 4.

Appeal.
June 26.

Statute of Limitations—Tithe rentcharge—Discontinuance of receipt—Subsequent receipt from person not liable—3 & 4 Wm. 4, c. 27, s. 3—37 & 38 Vict. c. 57, s. 1.

A tithe rentcharge was not paid for a period of three and a half years from 1886. At the end of that time the owners of the tithe rentcharge, acting upon false information, innocently given, applied to the agent of a third party, who had not then, and never had, any estate or interest in the lands liable thereto, and who was not in privity in any way with the owners thereof, and received from him the arrears and all subsequent gales as they accrued due:—

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that there had not been a discontinuance of receipt within the meaning of section 3 of 3 & 4 Wm. 4, c. 27.

QUESTION arising on allocation as to whether the purchase-money of the lands sold in this matter was liable to redeem a tithe rentcharge. The facts on which the question arose as stated in the judgment of Wylie, J., were as follows:—

The lands formerly belonged to Thomas John Kearney, Deputy-Assistant Quartermaster-General, who, by his will, which was proved in September, 1857, devised them to trustees for his infant daughter Bertha Kearney. By a conveyance of the 4th August, 1876, said trustees conveyed the lands to Bertha Kearney after she attained age; and by her marriage settlement of the 3rd January, 1877, she conveyed the lands to trustees upon trust to sell. The vendors are the present trustees of that settlement. In a schedule to each of said deeds this tithe rentcharge was set out as a charge upon the lands, and was duly paid up to 1886 on behalf of the owners, first by an agent named Delahunt, and after-

Wylie, J.
1908.
In re WINTER'S ESTATE.

wards by an agent named Howard, town clerk of Waterford. For three and a half years after 1886 the receivable order for each half-yearly payment was sent in due course to Howard, but no notice was taken of any of them, and no payment was made. The Church Property Department thereupon, according to what was stated to have been their usual course, sent a number of queries to the Clerk of the Union, asking amongst others (1) the name of the owner of the interest which Captain Kearney had in these lands, described as Dunhill, parish of Dundalk, in the county of Kilkenny, and also (2) the name of the person to whom the tenants paid their rents? The clerk answered the first question by giving the name of Charles Tottenham, Esq., 1, Grosvenor Place, London, and the second question by giving the name of Lewis J. Watters, Esq., 27, Patrick Street, Kilkenny. Accordingly, in December, 1890, a receivable order for three and a half years' arrears of this tithe rentcharge, payable by Charles Tottenham out of the lands of Dunhill, was sent to Mr. Watters, his agent. Now it so happened that Charles Tottenham had succeeded another man named Kearney as owner of lands called Annfield, adjoining the lands sold in this matter, which were also known as part of the lands of Dunhill; and Mr. Watters, who had then recently become agent, and had no reason to doubt the accuracy of the receivable order, paid the three and a half years' arrears on behalf of Charles Tottenham out of the rents and profits of Annfield, and continued to pay the tithe rentcharge up to 1907, when the question of liability was raised in this matter.

Leech, for the Irish Land Commission:—

In order to set up the statute, it must be shown that we had knowledge that the wrong person was paying the tithe rentcharge, or that we would have had knowledge but for laches or negligence on our part. We adopted what was the recognized practice of applying for the necessary information to the Clerk of the Union, who was bound to have it before him for the purpose of rating. There was no laches or negligence on our part, and there has been no "discontinuance of receipt" within the meaning of sect. 3 of the Act of 1833: *Adnam* v. *Earl of Sandwich* (1); *Irish Land*

(1) 2 Q. B. D. 485.

Commission v. *White* (1); *Irish Land Commission* v. *Farrelly* (2). Here the receipts for the tithe rentcharge and arrears were given by us in respect of and in discharge of the lands liable. There is nothing in the section to say by whom the rent must be paid.

(1) [1896] 2 I. R. 410.

(2) 23rd June, 1902. Unreported. In that case Mr. Justice Wright's judgment was as follows:—

This was a civil bill brought by the Irish Land Commission, claiming the sum of £17 15*s.*, being twelve half years' arrears of tithe rentcharge due up to the 1st May, 1901, out of the lands of Ervey, in the county of Meath. The case was heard before the County Court Judge (Judge Curran) at the Sessions at Navan, and an order was made by him on the 3rd February last, dismissing it without prejudice. From that dismiss the present appeal was taken, and was heard by me at the recent Trim Assizes. The question was altogether one of law, viz., whether, under the circumstances, the Statute of Limitations applied or not; and I thought it would be more satisfactory to reserve judgment until I had an opportunity of looking into the authorities.

The facts are as follows:—Portion of the estate of Edward S. O'Reilly was sold in the Land Judge's Court in the year 1882 to a gentleman named Lucas, who, in the year 1894, sold this portion to the defendant. In the rental prepared on the occasion of the sale in the Land Judge's Court it was set out that this portion was subject to the tithe rentcharge in question. Other portions of O'Reilly's estate remained unsold, and a gentleman named Synge was appointed receiver of this unsold portion, and he, under a mistake, paid the tithe rentcharge due out of the lands which had been sold down to the year 1898, when the mistake was discovered. I am satisfied that the Land Commission were not guilty of any laches. Two authorities were referred to by Mr. Greer on behalf of the plaintiffs, viz., *The Irish Land Commission* v. *White*—a decision of the Exchequer Division in this country, and *Adnam* v. *The Earl of Sandwich*—a decision of the English Queen's Bench Division. The latter case is a very strong one. In the year 1812 lands subject to a fee-farm rent were sold and conveyed to a predecessor in title of the plaintiff. For a period of sixty years the vendor and his successors in title, under a mistake of fact, continued to pay the rent, notwithstanding they had ceased to have any interest in the lands, the owner of the rent being ignorant of the conveyance to the plaintiff's predecessor in title. When the mistake was discovered, the defendant, the owner of the rent, demanded payment of it from the plaintiff, and on her refusal to pay it distrained on the lands for the arrears. The plaintiff thereupon replevied, and the question was whether the defendant's title to the rent was barred by the Statute of Limitations. It was held by Mellor and Field, JJ., that, under the circumstances, the plaintiff's title to the rent was not barred by the statute. Field, J., in his judgment, states:—"The legitimate

Wylie, J.
1908.

In re WINTER'S ESTATE.

Carrigan, for the vendor :—

Discontinuance of payment within the meaning of sect. 3 took place in 1886, and, so far as the vendor is concerned, continued ever since. In the cases cited the persons entitled to the rent-

object of all Statutes of Limitation is, no doubt, to quiet long-continued possession, but they all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land, or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties; and as the effect of the statute of 3 & 4 Wm. 4, c. 27, which is now relied upon by the plaintiff, is to divest the estate of the rightful owner, and convey it to a wrongdoer without compensation to the former, to hold that such a transfer takes place, in cases where the rightful owner has been guilty of no neglect or default, would work such an injustice to him as to induce us to resort to any reasonable construction of the statute which should avoid so unjust a result. And we think that the language of the statute is fairly open to such a construction." Then, after reading sections 2 and 3 of the statute referred to, he continues :—"It appears to us, therefore, that in order to bring a person rightfully entitled within the operation of this section, so as to divest him of his rights, there must be a 'discontinuance' of the receipt by him, *i.e.* by not applying for payment, or omitting to enforce his remedies with knowledge that the payment has not been made. But in the present case the defendant, so far from discontinuing the receipt, has all along, since 1812, in the same manner as before, been receiving, as and for the rent, that which the person paying has been paying as and for the rent. The defendant has not omitted to receive the rent—he has not slept upon any right, or to his knowledge left any dormant, and he had never the slightest reason for supposing that a prescription was running against him which could deprive him of any."

It will be found, on looking further into that case, that there was a second ground for the decision, viz., that, under the circumstances, it must be presumed that on the conveyance of the lands before-mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, and that the payments of rent from 1812 were therefore made on behalf of the plaintiff and her predecessors in title. That is a ground which does not apply in the present case. I now come to the case of *The Irish Land Commission* v. *White*. There the owner of an estate in fee-simple, by deed dated 17th September, 1851, purported to demise certain lands for lives renewable for ever. Notwithstanding this deed, the owner in fee paid the tithe rentcharge up to 1886, when the payment of it ceased. The Irish Land Commission, to whom the tithe rentcharge was payable, now brought an action for the arrears

charge continued to receive it from the former owners of the lands liable after they had parted with their interest in the lands; and accordingly it was held there was no discontinuance of receipt within the meaning of sect. 3. In *The Irish Land Commission* v. against the person entitled to the lands under the lease of 1851, of which lease the Land Commission had no notice. Two questions were decided in that case—first, that under the lease for lives renewable for ever the defendant was the owner of the first estate of inheritance in the lands, and therefore liable to pay the tithe rentcharge—a question which does not arise here; and, secondly, that the tithe rentcharge was not barred by the Statute of Limitations.

Dealing with the second question, Andrews, J., states in his judgment:—"The next question is whether, on the facts stated, this tithe rentcharge was barred by the statute at the time the plaintiffs brought their civil-bill action. I think the case of *Adnam* v. *Earl of Sandwich* is a distinct authority that it was not"; and after referring to the passage from the judgment of Field, J., which I have already read, he goes on to say:—"In that case, as in this, the question arose upon the 2nd and 3rd sections of the 3 & 4 Wm. 4, c. 27, and not upon the 40th section. Under the 3rd section the plaintiffs' right to bring an action to recover the tithe rentcharge would have first accrued when the plaintiffs, while entitled thereto, had been dispossessed of it, or had discontinued the receipt of it. There was no dispossession, even assuming that word to be applicable to a rentcharge, and there was no discontinuance of the receipt of the tithe rentcharge until 1886, which is well within the present twelve years' period of limitation. Up to 1886 the payments were made as and for the tithe rentcharge, and were received as such, the plaintiffs being, as is not denied, ignorant of the existence of the deed of the 17th September, 1851. There was no laches on the plaintiffs' part up to 1886; and until that time they did not sleep upon any right they knew of."

That was a decision of the Exchequer Division. I entirely approve of it; but even if I did not, I should be bound to follow it.

Now, in the present case I hold that up to 1898 the Irish Land Commission did not know of the conveyance in 1882, and could not reasonably have discovered its existence. They were not in default, and did not sleep on any right they knew of. They were receiving the tithe rentcharge, and did not know that they were receiving it from a person not liable. I hold, therefore, that the defence of the Statute of Limitations fails. The decision of the learned County Court Judge must be reversed, and a decree given for the amount claimed.

[On a case stated, at the request of the defendant, to the Court of King's Bench, the above judgment was affirmed on the 26th February, 1903, the question in the case stated—viz., "Is the plaintiff's claim barred by the Statute of Limitations?"—being answered in the negative.]

Wylie, J. 1908.

In re WINTER'S ESTATE.

Farrelly(1), Wright, J., found as a fact that the deed between the parties was not known to the Land Commission, and accordingly that there was no default. Here there was a total discontinuance of payment for three and a half years. The Land Commission neglected to enforce payment during that period, and then accepted payment of arrears and subsequent gales from a stranger to the lands.

May 4.

WYLIE, J. :—

In this case the Land Commission claim that the purchase-money is liable to redeem a tithe rentcharge of £6 14*s.* 2*d.* alleged to have been payable at the date of sale out of the lands sold. The vendors admit that the lands were formerly liable to pay this tithe rentcharge, but rely upon the Statute of Limitations as a bar to the claim now made. All the material facts have been clearly ascertained, and are now admitted by both parties. [His Lordship stated the facts as above set out.]

Now, it being admitted that no payment has been made or acknowledgment given in respect of this tithe rentcharge by or on behalf of the owners of the lands sold since 1886, the question is, whether the payment by mistake, under the circumstances mentioned, by Mr. Watters as agent for a third party, who had not then, and never had any estate or interest in the lands sold, and who was not in privity in any way with the owners thereof, prevents the owners of these lands from relying on the Statute of Limitations.

I cannot imagine how there could be any doubt as to the proper answer to that question.

But counsel for the Land Commission contends that they were not guilty of any laches or default or neglect in respect of requiring or enforcing payment against the owners of the lands liable thereto, and that, therefore, the statute does not run against them. In support of that contention counsel relied upon three cases cited by him, viz.: *Adnam* v. *Earl of Sandwich* (2); *Irish Land Commission* v. *White* (3); and *Irish Land Commission* v. *Farrelly* (1),

(1) *Ante*, pp. 531-533. (2) 2 Q. B. D. 485. (3) [1896] 2 I. R. 410.

Wylie, J.
1908.

In re WINTER'S ESTATE.

decided by Wright, J., a print of whose judgment I have had an opportunity of reading. But each of those cases differs materially in its facts from this case. In each of those cases the owner of the lands liable to the rentcharge continued to pay it after he had conveyed away the estate which was liable to pay, and the persons entitled to the rentcharge continued to receive it after such conveyance from the same persons and in the same manner as formerly, without any knowledge of any transmission of interest, and the Court in each case, accordingly, held that there was no "discontinuance of receipt" within the meaning of the 3rd section of the statute.

But in this case, notwithstanding that no notice was taken of their half-yearly demands for three and a half years, they neglected to enforce payment during that period, and, at the end of that period, believing that there was a change of ownership, instead of ascertaining definitely for themselves why it was that the Town Clerk of Waterford was ignoring these receivable orders, they chose to act upon false information innocently given to them by the Clerk of the Union, and succeeded in obtaining from the agent of a stranger to the lands and to the owners payment not only of the arrears then due, but of all future gales.

In my opinion, there was a clear discontinuance of receipt in this case for three and a half years, causing the statute to run from the last payment in 1886 in favour of the owners of the lands; and the subsequent payment by an entire stranger of the arrears and future gales could not, in my opinion, prevent it running on for the full period.

I therefore disallow the claim.

J. E. W.

Appeal.
June 26.

The Land Commission appealed (1).

Ronan, K.C., Meredith, K.C., and *Leech*, for the appellants.

Serjeant O'Connor, K.C., and *Carrigan*, for the respondent.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1908.

In re WINTER'S ESTATE.

THE LORD CHANCELLOR:—

We have no doubt that the Statute of Limitations has no application to this case, and that the right of the Land Commission to the tithe rentcharge here in question was kept alive by the payments made by Mr. Watters. I would have arrived at this conclusion apart from the decision in *Adnam* v. *Earl of Sandwich* (1), and having regard to the words of the statute alone. It has been pointed out in *Adnam* v. *Earl of Sandwich* (1) that under section 3 there must be an actual dispossession or discontinuance of the receipt of the land or rent respectively, in order that the section should apply. That points to a state of affairs where a man with full knowledge of his rights, and knowing that he has been deprived of them, chooses to remain quiescent without seeking to enforce any remedy. But in the present case there has been no dispossession or discontinuance of receipt of this tithe rentcharge, which was paid up to the year 1886 by Mr. Howard as agent of the estate. He omitted to pay it for three and a half years from that date, and made no reply to applications for payment, whereupon the Church Property Collection Department, becoming apprehensive, applied for information in the usual course to the Clerk of the Union in which the lands out of which the tithe rentcharge was payable were situated. They were then informed, erroneously but in good faith, that the lands were owned by Mr. Charles Tottenham, and that Mr. Watters received the rent; and accordingly application was made to Mr. Watters for the arrears of the tithe rentcharge, and he paid the amount of the arrears on the 24th March, 1891, and continued to pay the tithe rentcharge from time to time as it accrued due, and that tithe rentcharge was paid to the Land Commission and received by them, as and for the tithe rentcharge to which they were entitled, out of the lands of Dunhill Big. There was clearly no "discontinuance" of the receipt; the evidence exactly negatives any such discontinuance. But we further find that in 1903 Mr. Watters made a statutory declaration under the provisions of the Tithe Rentcharge (Ir.) Act, 1900, on receipt of which the charge was varied and reduced, which shows that

(1) 2 Q. B. D. 485.

the Land Commission were convinced that they were dealing with the proper parties to pay the charge, and that the latter were entitled to a reduction.

Adnam v. *Earl of Sandwich* (1) is an apposite and precise authority on this point, and both on the authorities and on the words of the section we have come to the conclusion that the order of Mr. Justice Wylie cannot be sustained.

FITZGIBBON and HOLMES, L.JJ., concurred.

Solicitor for the Irish Land Commission: *Wm. Alexander.*
Solicitor for the vendors: *P. A. Murphy.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF PAUL CHRISTMAS ANDERSON.

Wylie, J. 1908. Nov. 5, 9.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 3—*Originating application, containing application by absolute owner of land to Land Commission to purchase his demesne with a view to re-purchase—Death of vendor before offer made—Jurisdiction of Estates Commissioners to make offer to his devisees.*

A vendor, who was absolutely entitled, filed an originating application for the sale of certain tenanted lands, and thereby applied to the Land Commission to purchase his demesne with a view to the re-purchase thereof by him. The vendor died before the advances for the purchase of the tenanted lands (which were subsequently sanctioned) were made, having by his will devised all his real and personal property to his trustees and executors, upon trust for sale, but with power to postpone such sale so long as they might think fit:—

Held, that the Estates Commissioners had jurisdiction to make an offer to the trustees for the purchase of the demesne, and to sanction an advance for the re-purchase thereof by the trustees.

QUESTIONS submitted by the Estates Commissioners for the opinion of the Judicial Commissioner, under sect. 23, sub-s. 1, of

(1) 2 Q. B. D. 485.

Wylie, J. 1908.

In re ANDERSON'S ESTATE.

the Irish Land Act, 1903. From the memorandum of the Estates Commissioners the following facts appeared.

The vendor, Paul Christmas Anderson, was absolute owner in fee-farm of the lands comprised in the originating application, which was filed on the 23rd August, 1905. The lands included therein comprised—(*a*) tenanted lands, and (*b*) demesne lands containing 257A. 3R. 35P., with mansion house, office, and gardens.

By the originating application the vendor applied that the Land Commission might purchase the demesne, and therein stated that he was desirous of re-purchasing the same. On the 24th February, 1907, before the advances for the purchase of the tenanted lands were sanctioned, the vendor died, having made a will which was duly proved, whereby he appointed Thomas W. Anderson, and Alexander C. Anderson, his executors and trustees. By his will he devised and bequeathed to them all his real and personal estate in trust for sale, and out of the proceeds of such sale, after paying his debts and certain legacies upon trust, to pay the income of the residue of such proceeds to testator's sisters, Jane E. Anderson, Henrietta Anderson, and Susanna Anderson, and the survivor of them during their lives or life, and after the death of the survivor of them to pay certain legacies, and subject thereto to pay and transfer the residue of the said trust property to the said Alexander C. Anderson for his own use and benefit; and the testator declared that his said trustees or trustee might postpone the sale and conversion of his real and personal estate, or any part thereof, for so long as they should think fit; and that the rents, profits, and income of such part of his property as should for the time being remain unsold or unconverted should be paid and applied to the person or persons to whom the same would for the time being be payable or applicable if such sale and conversion had been actually made.

On the 3rd June, 1907, an order was made by the Estates Commissioners to continue the proceedings as to pending sales only in the names of the executors, the said Thomas W. Anderson and Alexander C. Anderson. The tenanted lands which had been provisionally declared an estate on the 23rd February, 1906, were finally declared a separate estate on the 7th November,

1907, and on the same day advances in respect thereof amounting to £2004 were duly made.

The trustees were anxious to carry out the sale of the demesne, and to re-purchase it for the benefit of the persons entitled under the will. The Estates Commissioners were prepared to purchase the demesne for the sum of £10,289, and to advance the sum of £4,097, for the re-purchase thereof by the said Thomas W. Anderson and Alexander C. Anderson, provided such purchase and re-sale could properly be carried out under the terms of section 3 of the Irish Land Act, 1903.

The following questions of law were submitted for the opinion of the Judicial Commissioner:—

1. Whether the proposal of the vendor, Paul Christmas Anderson, to sell the demesne lands with a view to their re-purchase, as mentioned in the said originating application, could now be carried into effect with the trustees and executors of his said will.

2. Whether the Estates Commissioners could, under section 3 of the Irish Land Act, 1903, make an advance to such trustees and executors for the purpose aforesaid.

A. W. Samuels, K.C., for the trustees:—

Under section 21 of the Settled Land Act, 1882, trustees may invest in the purchase of land. These trustees are trustees for the purposes of the Settled Land Acts. There was a proceeding in Court, which need not abate by the death of the absolute owner: see Landed Estates Court Act, section 36.

The right to an offer is attached to the sale of the tenanted land, and is like an option, which the trustees can exercise. The judgment of Holmes, L.J., in *Sherlock's Estate* (1), shows that an option can be exercised after death of a person who has made an offer. They have power to sell, and there is nothing to prevent them from continuing one portion of the proceeding as well as the other. The sale of the tenanted land and the sale of the demesne are really portion of the same transaction. Sub-sect. 5 of section 3 contemplates the case of lands to which the vendor was entitled, subject to a settlement.

(1) [1899] 2 I. R. 521.

Wylie, J. 1908.

In re ANDERSON'S ESTATE.

G. A. M'Gusty, for the tenants for life :—

The question is simply one of jurisdiction. There is plenty of money for payment of legacies. Section 3 is an enabling section, intended to enable families to remain on their demesnes, and is not for the benefit of particular landlords. After the vendor had filed the originating application there was nothing else for him to do, but wait for the machinery of the Land Commission to work. The distinction between enabling sections and other sections is shown in Hardcastle on the Statutes (1). The words "or his successors in title" should be supplied in section 3. The individual is not meant, for it is evident that he is not to have it in certain events. Though the sale is to him, it is to be on the trusts of the settlement. The Act gives the vendor a right to an offer from the Land Commission for the purchase of his demesne. The trustees have not only a power of sale, but also power to postpone sale. The right to re-purchase the demesne is, like the bonus, an inducement to the vendor to sell to his tenants.

Nov. 9.

WYLIE, J. :—

I do not think it is necessary to express any opinion on the general effect of section 3 of the Act of 1903. The testator was absolute owner in fee of the tenanted lands and demesne. Inasmuch as the proceedings both to sell the tenanted lands and the proposal to sell the demesne with a view to its re-purchase were pending at the date of the death of the vendor, I think it is competent for the Estates Commissioners to make an order to continue the proceedings, not only in respect of the tenanted lands constituting the estate, but also in respect of the demesne. The proceedings can be continued in the names of the devisees in trust under the will.

Solicitors for the trustee : *Dobbyn & M'Coy.*
Solicitor for the tenants for life : *George Greer.*

J. E. W.

(1) 1907 edition, pp. 108, 229.

BLACK *v.* SCOTTISH TEMPERANCE LIFE ASSURANCE CO.

(1905. No. 353.)

Barton, J.
1905.
Nov. 16, 17, 22, 23, 24, 29, 30.
Dec. 1.
1906.
Feb. 3, 5.
March 6.
Nov. 1.
1907.
Jan. 19.
Appeal.
April 24, 25.
March 1.
H. L.
1908.
Mar. 14, 18, 20, 24.

Light—Obstruction—Substantial interference—Actionable nuisance—Substituted light—Mandatory injunction.

In an action for the obstruction of ancient light in the plaintiff's building (purchased by him at a cost of £1950) by a new red-brick building, erected at great expense after remonstrance by the plaintiff, Barton, J., held, that an obstruction, amounting to an actionable nuisance, had been caused by the new building, and, by a decree dated the 3rd March, 1906, granted an injunction restraining its continuance so as to cause such actionable nuisance; but intimated that such injunction would not be enforced for a period sufficient to enable the defendants to abate the nuisance. The defendants then caused the red-brick wall of the new building, which intercepted the light, to be faced with white tiles, which they alleged so improved the light coming to plaintiff's windows as to abate the nuisance. Upon motion by the plaintiff for a writ of sequestration, Barton, J., pointing out that the plaintiff had no prescriptive right to the substituted light, and being of opinion that the damage to the plaintiff's windows from the wall, even if faced with white, would be not less than £500, on the 19th January, 1907, ordered a writ of sequestration to issue.

On an appeal by the defendants against both the judgment of 3rd March, 1905, and the order of 19th January, 1907, it was held by the Court of Appeal that, having regard to the amount of damages and the circumstances of the case (including the effect of the white tiles), the plaintiff was not entitled to an injunction, but (on the plaintiff declining to accept £500 damages) directed an inquiry as to damages, the costs of same to depend upon the result, as if defendants had lodged £500 in Court.

Held, on appeal by the plaintiff to the House of Lords, that the order of the Court of Appeal should be reversed, and the order of Barton, J., restored.

Per Lord Robertson: The Court would not be justified in holding that an actionable obstruction of ancient light could be justified by the substitution of light reflected from a white surface, when the injured owner had no legal right to the continuance of these newly created conditions.

THE PLAINTIFF in this action was a wholesale manufacturer of ready-made clothing, and carried on his business in certain premises known as 3 and 5 James's Street, South, Belfast, which

Barton, J. 1905.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

were held by him under a lease dated 27th June, 1884. The premises were erected about the month of February, 1885, by the plaintiff's predecessors in title, Messrs. McCrum, Watson, and Mercer, linen merchants, who had used the premises for the purposes of their business previous to their assignment to the plaintiff, on 31st December, 1901, of the lessee's interest in the premises, which the plaintiff purchased for a sum of £1950.

The premises in question had a frontage of 44 feet to James's Street, South, and a measurement in the rear of 44 feet, and extended back from front to rear 88 feet. The buildings thereon consisted of a main building, having a frontage of 44 feet to James's Street, South, and extending back from front to rear 54 feet, and having a height of 48 feet to the eave. In the rear there was a one-story building 12 feet high to the eave and 20 feet 9 inches to the ridge, extending in length 44 feet, and extending in breadth 34 feet. This one-story building was covered with a glass roof; and in the wall separating it from the ground-floor of the main building there were three windows and a door. The windows in James's Street faced south, and the windows in the rear faced north.

The following rooms were included in the plaintiff's premises:—(1) the room formed by the said one-storied building, called the cutting-room, and lit by light coming through the glass roof; (2) the room on the ground-floor of the main building, called the stock-room, lit on the north side by borrowed light, passing from the cutting-room through the three windows in the separating wall, and on the south side by two windows looking into James's Street, South; (3) the room on the first floor of the main building, called the examining-room, lit on the south side by six windows looking into James's Street, South, and on the north side by five windows looking over the roof of the cutting-room; (4) the room on the second floor, called the finishing-room, lit on the south side by six windows looking into James's Street, South, and on the north side by four windows looking over the roof of the cutting-room; (5) the room on the third floor, called the sewing-machine-room, lit on the south side by six windows looking into James's Street, South, and on the north side by four windows looking over the roof of the cutting-room. Each of the four rooms in the main building was

12 feet in height, 40 feet in width, and in depth from north to south about 50 feet. Besides the above-mentioned windows, there was in each of the floors of the main building, and in line with the windows on that floor, a window lighting the staircase.

The plaintiff employed in this building, on a daily average, from eighty to 100 workers, and turned out about 120,000 suits per year. About 75 per cent. of the trade was in juvenile suits of ordinary navy blue serge. The method of conducting his business, prior to the erection of the defendants' new buildings, was as follows:—Samples of suits were submitted to prospective buyers in the examining-room, and the buyers selected from the samples, according to their opinion as to the best shade, texture, and quality, in accordance with their customers' demands. When an order according to sample was given, the plaintiff purchased webs of cloth of the same shade, texture, and material from wholesale firms in England and elsewhere. These webs, when delivered to the plaintiff, were examined in the stock-room with the sample, to ascertain how far the material was equal to the samples in all respects. If the web was not according to sample, it was returned, otherwise it was retained in the stock-room until required for the manufacture of the suits. When the time arrived for making the suits, the web, according to sample, was brought from the stock-room to the cutting-room, where it was cut up into several pieces required for the garment. Numbers of the same pieces were cut out at one time by means of revolving knives making 300 revolutions per minute. When the cloth was so cut, the several pieces were sent up to the third floor, the sewing-machine-room, where the suits were stitched together. They were then brought down to the second floor, the finishing-room, where thread and buttons were matched, and the suits lined, finished, and pressed. The finished goods were then brought down to the first floor, the examining-room, where they were examined for defects of colour and texture, or bad stitching, lining, or finishing. If correct, they were then sent to the customer as required.

A southern light was, according to the case made by the plaintiff, not suitable for the examining of cloth or for the matching of colour; and all the work in this connexion was carried on at some of the northern windows in the rear of his premises. Prior

Barton, J. 1905.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

to the erection of the defendants' new buildings, the light entering the northern windows of the plaintiff's main premises and the cutting-room was obstructed on the north-west by old buildings occupying the site of the defendants' new buildings. The site so occupied was a rectangular piece of ground, having a frontage on the south to James's Street, South, on the west to Bedford Street, and on the north to Donegall Square, South. Its eastern boundary adjoined and extended along the western boundary of the plaintiff's premises from James's Street, South, to Donegall Square, South. Upon this site there was a covered gateway, 15 feet wide and 9 feet 2 inches high to the eave, running from James's Street, South, along the western boundary of the plaintiff's premises for a distance from James's Street, South, of about 90 feet, and separating from the plaintiff's premises the old buildings which occupied the rest of this site. These old buildings had a height of 45 feet 6 inches to the ridge of the roof, and 36 feet 9 inches to the eave.

According to the plaintiff, prior to the erection of the defendants' new buildings, good ordinary light, sufficient for the purposes of his business, entered the cutting-room and the stock-room, and the first and second windows, counting from the west, of the examining-room and the finishing-room and machine-room. This light was mainly supplied by the light coming from the north-west over the defendants' old buildings. The light entering the third, fourth, and fifth windows in the examining-room, and to a less degree the light entering the third and fourth windows in the finishing-room, was, according to the plaintiff, defective, and not suitable for the plaintiff's business, owing to obstruction by the buildings on the north-east. The light required for carrying on the plaintiff's business was a good ordinary light.

Some time in the year 1904 the plaintiff ascertained that the defendants had purchased the premises forming the site of their new buildings, and intended erecting thereon a building 15 feet nearer to the plaintiff's premises than the old buildings, and having a height of 72 feet to the eave instead of 36 feet 9 inches. Thereupon the plaintiff wrote to the defendants, cautioning them against proceeding with such building on the lines contemplated, as the light entering the plaintiff's premises was essential for the carrying on of his trade, and warning the defendants that if

they proceeded with their buildings on the lines contemplated, the plaintiff would have to apply to the Court for protection. The defendants replied that they were indemnified against claims for ancient light by Mr. W. Ewing, from whom they had purchased the premises, and that they could do nothing in the matter. After a further considerable correspondence the defendants finally wrote, stating that they could do nothing in the matter unless the plaintiff could settle with Mr. Ewing, and suggesting that the plaintiff should put forward the amount of compensation he was entitled to. The plaintiff replied, objecting to their suggestion that he should apply to Mr. Ewing, and repudiating the assumption that he was merely claiming compensation, and that he would apply for an injunction.

The writ was issued on the 6th April, 1905.

At the date of the trial the defendants' new building, covering the above-mentioned site, including the 15-feet gateway, had been erected at a cost of £32,000 to its full height, namely, 72 feet to the eave. Rising to this height, the eastern wall of the defendants' new building was in contact with the plaintiff's main building. Evidence was produced by the plaintiff to prove that in the north-westerly direction, from which across the defendants' old building the best supply of light had reached the windows on the lower floors of the plaintiff's building, the increased height of the defendants' new building had increased the average angle of intercepted light at the points and in the degrees following, viz., at a point in the glass of the first window of the first floor, on line with the examining table in that room, from 24 deg. 51 min. to 57 deg. 44 min.; at a corresponding point on the first window on the second floor, from 13 deg. 32 min. to 51 deg. 21 min., and at a corresponding point on the first window on the third floor, from 1 degree 4 min. to 42 deg. 31 min.; that to a person standing opposite the eastern jamb of the first window on the first floor, at a distance of 1 ft. 3 in. from the glass of the window, and at a height of 5 ft. 8 in. from the floor, no sky was now visible; and that at the same point, before the erection of the defendants' building, sky was visible to the extent of three-fourths of that window. Witnesses were also produced to prove that an examining-room was necessary for any business similar to that of the

Barton, J. 1905.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

plaintiff; and that, prior to the erection of the defendants' new building, the light entering the first and second windows of the plaintiff's examining-room was good ordinary light, sufficient for the examination—necessary in any business similar to that of the plaintiff's—of colour and texture of material, and suitable for the purposes of any business similar to that of the plaintiff's; and that the effect of the increased height of the defendants' new building was to render the light entering these windows, and to a somewhat smaller degree the light entering the corresponding windows in the finishing-room, insufficient for examination of colour and texture of materials, and to render the finishing-room unsuitable owing to defective light for the purposes of the business carried on by the plaintiff, or any business similar thereto, and to render the examining-room useless as such; that the light in the stock-room had been rendered so defective as to make the proper examination of webs in that room impossible; and that even in the cutting-room it was necessary to light the gas three-quarters of an hour earlier in the afternoon.

The eastern wall of the defendants' new building was built of new red brick; and it was alleged, on behalf of the plaintiff, that the light of which his windows were deprived by the defendants' new building was to some degree replaced by light reflected from the surface of the new wall; and that this reflected light was tinged with red, and that the effect of this red-reflected light entering the plaintiff's windows and the glass roof of the cutting-room was to produce upon the eye a false impression of the colour of any material examined in that light.

On behalf of the defendants, witnesses were called to prove that the light then coming to the plaintiff's premises was sufficient for all the purposes of any ordinary business, and that they were able to distinguish the finest shades of colour of blue cloth, and to distinguish the differences in the finest texture at these windows. Evidence was also given that the light at these windows was amply sufficient even for the fine processes carried on in the linen trade, which required a very good and pure light; and architects and engineers were also examined for the purpose of proving that there was in their judgment no substantial diminution of the light. The defendants also maintained that the principal ground of the

plaintiff's complaint was that the light was discoloured by the reflection from the defendants' red wall.

The plaintiff claimed an injunction to prevent the defendants from further increasing the height of their building, and from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the covered gateway and buildings which formerly stood on the site of the defendants' new building, and to prevent the defendants from permitting to remain any portion of the building already erected by them which had caused or would cause any such obstruction; and also an inquiry as to the damages sustained by the plaintiff by reason of the wrongful acts of the defendants.

On the 3rd March, 1906, Barton, J., gave judgment, and held upon the evidence as follows:—(*a*) That the defendants had acted very deliberately, and with their eyes open, and that the reply to plaintiff's letters, that they were indemnified by Mr. W. Ewing against any claim, was very unsatisfactory. (*b*) That the case did not turn by any means on the mere question of red brick, which was only one of the elements in the case, having regard to the great height and close proximity of the wall. (*c*) That the stock-room had been undoubtedly darkened; that formerly goods on arrival could be compared with samples in that room, and that bales required could be selected; that these were ordinary incidental uses of such a room; that these uses were no longer possible; that the change undoubtedly involved inconvenience and loss of business. (*d*) That the cutting-room had been undoubtedly darkened; that the gas had to be lit three-quarters of an hour earlier; that the danger and difficulty of working knives had been increased; that the light was no longer suitable for matching and sorting, or distinguishing textures or colours; that inconvenience and dislocation of business had been caused there; but that so far as this room was concerned it was likely that if the defendants' wall was white instead of red, the effect would not be so serious, or amount to a nuisance. (*e*) That it was conceded that the best available light was required for the machine-room, and the top floor was properly assigned to it; that the light there had not been appreciably diminished, but the space available for machines had

Barton, J. 1905.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

been narrowed by an additional table being put in, owing to the darkening of the room below. (*f*) That in the finishing-room on the second floor there had formerly been two tables for putting in button-holes, sewing on buttons, lining suits, and matching threads and buttons; that the inner table had to be removed upstairs, as the light was no longer good enough to enable the work to be done, except at the window, and that even at the window-table the work could not be done as efficiently as before; that here again there had been inconvenience and dislocation of business caused by the defendants' new building. (*g*) That in the examining-room on the first floor most of the matching of colours and examination of goods and suits for defects of colour and texture was done, whether in buying or selling, or in the final examination of made-up goods; that the defendants' witnesses admitted that a room of this kind was an essential part of a woollen or linen factory; that there was no suggestion made that this was not the proper room and floor for the purpose; that prior to the erection of the defendants' building, the room was perfectly adapted and effective for its purpose; that since the erection of the defendants' building it was practically useless for all such purposes. (*h*) That an ordinary good light had been converted into an extraordinary bad light. (*i*) That the plaintiff's business was an ordinary class of business, and required no more than ordinary good light. (*j*) That the plaintiff's premises were formerly suitable for an ordinary linen factory, and were then unsuitable for that purpose owing to the difficulty of examining goods. (*k*) That upon a careful examination of the whole case he could not doubt that the defendants' building was an actionable nuisance to the plaintiff's ancient lights.

In concluding his judgment, without expressing any definite opinion upon it, Barton, J., suggested that it was possible that the nuisance might have been obviated, or reduced to dimensions compensable by damages only, if the defendants' building had been of white brick, or kept always white-washed; and that in view of that possibility he would not for the present allow the order for an injunction to be enforced for a period sufficient to allow the defendants to abate the nuisance. The defendants not having made any alteration in their building, upon the application of

the plaintiff, Barton, J., made an order, dated 25th June, 1906, fixing the 1st October, 1906, as the time within which the defendants should be bound to comply with the said judgment.

Barton, J. 1906. BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

Subsequently to the making of this order, the defendants asked for facilities for temporarily white-washing, and afterwards lining the wall of their building with white brick, and alleged that this would abate the nuisance. The plaintiff warned the defendants that this as a remedy for the injury would be useless and illusory, and would not abate the nuisance in law or fact. The facilities asked for were given by the plaintiff, upon the understanding that if the defendants proceeded with these proposed measures, they must do so on their own responsibility, and against the warning of the plaintiff.

On the 1st October, 1906, the defendants had covered the wall of their new building with white tiles (called verapal); and the plaintiff instituted a motion for leave to issue a writ of sequestration.

A. H. Bates, K.C., W. Martin M'Grath, K.C., and *J. H. Pigot*, for the plaintiff.

Gordon, K.C., Matheson, K.C., W. M. Whitaker, K.C., and *J. M. Whitaker*, for the defendants.

The following cases were cited: *Kine* v. *Jolly* (1); *Martin* v. *Price* (2); *Cowper* v. *Laidler* (3); *Shelfer* v. *City of London Electric Lighting Company* (4); *Colls* v. *Home and Colonial Stores, Limited* (5).

BARTON, J.:—

1907. Jan. 19.

This is an application, under Order XLII., Rule 32, to enforce by sequestration the order for an injunction made at the trial on the 3rd March, 1906. The 1st October, 1906, was by a subsequent order fixed as the time within which the defendant company should be bound to comply with the order. It has been pointed out that Order XLII., Rule 32, only applies where

(1) [1905] 1 Ch. 480; [1907] A. C. [1.
(2) [1894] 1 Ch. 276.
(3) [1903] 2 Ch. 337.
(4) [1895] 1 Ch. 287.
(5) [1904] A. C. 179.

Barton, J. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

there has been "wilful disobedience"; but nothing turns, in the present case, upon those words. Wilful disobedience includes any non-compliance which is not accidental or unintentional: *Attorney-General* v. *Walthamstow U.D.C.* (1); *Lee* v. *Aylesbury U.D.C.* (2). It appears that the defendants have, since the trial, tried to abate or obviate the effects of the nuisance, in so far as it was caused by the redness of the wall, by facing the red-brick wall in question with a white glazed tile called verapal, at a cost of something over £200; and they submit that the nuisance, or the injurious effect of the nuisance, has in this way been obviated, or at all events so far reduced as to be compensable by the damages, for which an inquiry was granted at the trial, and not to justify the enforcement of an injunction which would involve pulling down part of this building.

At the conclusion of the argument a suggestion was made that I might either appoint a surveyor to report to the Court, or myself visit the premises. It would serve no useful purpose to appoint a surveyor at this late stage of the proceedings. That being so, and in view of the suggestion which came from counsel, I thought it right to go to Belfast for the purpose of visiting the premises, because the case seems to me to be one of unusual magnitude and seriousness to the parties. The model is so excellent, and the evidence so ample, that a visit is not really necessary to enable a Judge to decide the case. But it has given me a more vivid impression of the bearings of the evidence, and helped me to a clearer appreciation of one or two points about which I felt some difficulty. In some respects the visit to the premises seemed to me to help plaintiff's case; in other respects it helped defendants' case. Speaking generally, it confirmed me in the view that this new building was, and is, in the legal sense of that term, a nuisance to the plaintiff. On the other hand, it modified my opinion as to the extent of the damage which it will do to the plaintiff.

I shall take plaintiff's five rooms in the order in which I took them in my judgment at the trial. First, there is the stock-room or store-room, where goods are on their arrival unpacked, com-

(1) 11 T. L. R. 533. (2) 19 T. L. R. 106.

pared with samples, and selected for manufacturing purposes. Formerly there was sufficient light to select the bales. The plaintiff said at the trial that this was no longer so, and that he had, since the erection of the defendants' building, to have goods carried into the cutting-room to be checked and selected in that room. That means that they have to be carried back into the stock-room if not the right ones. The defendants admitted that this was so, but said that the stock-room never could have had light enough for selecting goods. That, however, is setting up an *ex post facto* opinion against a proved fact. It is impossible that this room should not have been darkened. It is now at one side of the bottom of a deep wall; and the fact that its light was always borrowed does not make it less liable to be darkened. I have taken into consideration that the white tiles have improved the condition of things, and that the door of the cutting-room is close at hand to a person working in the stock-room. But making these allowances, I think the change of light in the stock-room still deprives it of what was one of its reasonable and appropriate uses, and will involve some additional labour or workmen's time. In my opinion, however, if the injury to this room stood by itself, it would be a matter compensable by moderate damages.

Next I come to the cutting-room, a glass-roofed room in the yard. I need not repeat what I said in my judgment about it. I found at the trial that inconveniences and dislocation of business had been caused; but I attributed it mainly to the red reflected light from the red-brick wall, and I said—"So far as this cutting-room was concerned, with its glass roof, I think it very likely that if the wall was white instead of red, the effect would not be so serious, or amount to a nuisance." In this opinion it turns out that I am right. The plaintiff says that although the light is not so good as formerly, it is now, since the red-brick wall has been faced with white, sufficiently good for carrying on his business. Accordingly, I may take it that so far as this room is concerned there is now no ground for serious complaint.

After the goods have been cut up and sorted in the cutting-room, they are sent to the sewing-machine-room, which is the top room in the house, where a number of workers, varying from forty-eight to sixty, are spread over the whole room, stitching the

Barton, J. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

suits with machines. This requires the best light, as it requires sufficient light throughout the whole room. I did not, and do not, think that there has been any such darkening of this room as would amount to a nuisance. But its available space has been diminished by a finishing-table having to be moved up, owing to the darkening of the room on the second floor.

This brings me to the finishing-room on the second floor. I found at the trial that inconvenience and dislocation of business had been caused by the darkening of this room. Formerly there were two tables in this room at which the finishing work could be done. It is fine work, and in the present condition of light can only be done at one table near the window. My visit to the place left no doubt on my mind that the plaintiff's witnesses are right in saying that it would be impossible to do such work at a second table further back in the room. I cannot disbelieve the evidence of the plaintiff and his witnesses, which is to the effect that this change was made owing to the darkening of the windows by the new building. I infer that, before the wall reached its full altitude, it had by its increased proximity and height begun to darken this room. As a result, part of this room has been put out of use, and the upper room has had its available space diminished; while the finishing work has to be done partly in one room and partly in another, instead of, as formerly, altogether in the room assigned to that branch of the works. Here again, however, I think that the injury might be compensable by moderate damages.

This brings me to the fifth and last, and most important, room—namely, the examining-room on the first floor. After the goods have been stitched on the top-floor, and finished on the second floor, they come down to the first floor to be finally examined and checked before going into the stock of manufactured articles. Here also there is carried out the principal part of the buying of materials, and selling of the finished and manufactured goods. Some buying and selling is also sometimes done in the cutting-room. As regards this room, I found at the trial that the defendants' building had rendered this examining-room practically useless for its appropriate purposes. This was due partly to the cutting off the northern light which formerly came over the open space, which defendants' counsel humorously described as the "Happy Valley,"

and partly by the red reflected light from the red-brick surface. So much was made of the red reflected light, and of its effect in confusing the various shades of blue cloth, that I found a difficulty in forming a clear opinion whether, and if so to what extent, it was an effective or dominant cause of mischief. Professor Joly, who was plaintiff's "red light expert," was of opinion that accurate matching of colour had been rendered impossible by this new building; but he mainly confined his attention to the effect of the red light; and he said that apart from red light, if the difficulty were only one of diminution of light alone, colour might, in his opinion, be matched; but the day would be substantially shortened, and matching rendered difficult, except on fine bright days. There was a good deal of evidence of other witnesses to the effect that, irrespective of the red reflected light, the light in the room had become insufficient for its purposes. It was in view of the difficulty of ascertaining whether, and if so how far, the red light was a dominant source of mischief in this room, and in the cutting-room, that I made the observations to be found in the last paragraph of my judgment, which I need not repeat.

The defendants having now faced their wall with white, the plaintiff has tested the new condition of things with the assistance of several other persons who are engaged in the woollen trade. Mr. Stanley, a customer of the plaintiff, and a witness at the trial, has made an affidavit, which is of a clear and definite kind. He examined two badly dyed webs in the first and second windows of the first floor, which, before the erection of defendants' wall, he had always used and found suitable. He was unable to see the defects, and would have passed them as correct. He found the light insufficient, and the colour of the cloth, owing to the deficiency of light, looked a different shade to what it actually is in normal daylight. He concludes by saying that, if this continues, he will be unable to buy goods from plaintiff. Mr. Stanley struck me at the trial as being an intelligent and independent witness, who gave material evidence. Then there is an affidavit from Mr. Fetherstone, a Belfast clothing manufacturer, who tried these windows on a fine bright day, and was quite unable to detect defective dyeing or to tell the actual shade and texture of blue cloth. He says that he would not purchase goods at either of the

Barton, J. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

windows, and that no buyer would be justified in buying goods there with the light as it at present exists. Then, there is Mr. Alfred Chapman, another Belfast clothing manufacturer. He tried the same tests with the same result, and says that these windows are quite unsuitable for the purpose of examining either webs or made-up goods with the light as it at present exists, and that no person buying goods at these windows could be satisfied that he was getting the colour he thought he was buying. He speaks with experience of the former condition of the premises; because he states that he was in plaintiff's premises on several occasions before the defendants' building was erected, and there was then ample light for examining webs and made-up goods at either of these two windows, even on dull days. Then there is the affidavit of another woollen manufacturer, named Wright, to the same effect; and there is the affidavit of plaintiff himself. Affidavits have been made on behalf of the defendants by several linen merchants. But, assuming their evidence to be all correct, it cannot be represented as displacing the evidence of plaintiff's witnesses; because it was a common case at the trial that, for discovering blemishes in linen goods, a direct, perpendicular northern light is not necessary, or even desirable; but, for examining woollen goods, what is required is an ordinary direct northern light, which this room had formerly. The only "cloth," as distinguished from "linen," witness, who has made an affidavit for defendants, is a tailor. He tried the test of small patterns held up to the eye, which may be a very good test for tailoring purposes, but is a fallacious test where it is a question of examining goods laid in webs or suits along a table at a window.

This practical aspect of this business question was not, I think, fully present to the mind of Professor Barrett, who has made an interesting affidavit on behalf of the defendants, which is to the effect that, in his opinion, plaintiff has been benefited by the new building, and is really under an obligation to the defendants for the service which they have done him by going to the expense of providing him with what he calls the "opalescent" light coming from this wall, in lieu of the ordinary light which formerly came from the northern sky. As regards Professor Barrett's comparison of woollen goods, I prefer to seek assistance from the evidence of

the trade witnesses. But upon the subject of light and vision, the opinion of Professor Barrett, as a scientific witness, is worthy of all respect and attention in this or any other Court. In paragraph 15 of his affidavit, speaking of the benefits which plaintiff will in his opinion reap from this white wall, he sums them up as follows:— "All the year round up to midday, and in summer up to the afternoon, this beautiful milk-white and large reflecting surface facing the south-east, which has been erected at defendants' expense, will be brightly illuminated and scattering its pure white light into plaintiff's windows." Again, in paragraph 18, after referring to the well-known effect of light scattered from clouds in the sky, he says that "instead of the fitful light scattered from occasional distant clouds in the western sky, the plaintiff has now an extensive white cloud, not at a remote distance, but permanently placed near his windows, and enhancing both the amount of light before midday, and at all times the purity of the light entering his windows." These conclusions are supported by interesting experiments and diagrams. I infer that this white wall will, sometimes and at certain times of day, reflect into plaintiff's windows a light more intense in its brightness than anything he enjoyed before. But a study of the whole evidence, and especially that of the practical business men, leads me to the conclusion that Professor Barrett's opinion is consistent with plaintiff's case—which is that he formerly had a steady uniform northern light of an ordinary prosaic kind, which suited the requirements of his ordinary business; and that the substitute, though it may be sometimes more dazzling in its brightness than the former light, does not meet those requirements, but, on the contrary, exposes him to dislocation of his trade, and to serious risks of error in the checking and examining of his goods.

Defendants' counsel made three answers to this very powerful case. In the first place, they criticized the test which was applied by plaintiff's witnesses. But to lay out on the table in the window blemished or defective webs, in order to see if the blemishes can be discovered, seems to me to be a fair test. Every test must be more or less artificial, and therefore more or less open to comment on that account; but the important matter was that the goods should be laid along the table, which is the way in which goods are

Barton, J. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

ordinarily examined. For the purposes of the trial, a garment stitched from several materials was used as a test. Defendants' counsel threw some ridicule upon it, and rather happily described it as "a coat of many colours." It would be difficult to suggest a test that would not be open to some criticism; but on the whole I think the test applied by plaintiff's witnesses for the purposes of this motion was a fair and reasonable test. In the next place, defendants' counsel said that this question of light in the examining-room only affected two windows out of twenty-four. That observation seems to me to be only superficially true. These were the two windows most suitable, and most frequently used for this particular purpose. The windows of the other rooms give no light to the examining-room; and of the windows in the examining-room, these were the only ones which directly received the valuable northern light before the new building was erected. In the third place, defendants' counsel put the same argument in a different way, by asking, "Why should not plaintiff go and do his examining elsewhere?" No such case was made at the trial. But the question is easily answered. So far as buying and selling are concerned it is possible that it might be relegated to the cutting-room. The evidence shows that it was sometimes done in that room; but that it was more usually done in the examining-room. So far as that is concerned, it is possible that, at the cost of crowding and disturbing the work in the cutting-room, arrangements might be made for all the buying and selling to be done in that room. The point was not developed at the trial; and it occurs to me that it might involve a serious dislocation of plaintiff's business arrangements. But I shall assume that it would be possible; and I shall also assume, without so deciding, that it is reasonable and lawful for defendants to submit plaintiff to that inconvenience and dislocation of business. But what about the examining and checking of the manufactured goods after they have gone through the process of manufacture, which is the essential and characteristic function of this room, and is a continuous and necessary department of the trade, requiring a separate room for the purpose? What other room is available? The cutting-room cannot be turned into an examining-room. It would be unreasonable to suggest such a thing; and I must say it has not been suggested. The top room

is the only possible machine-room. In no other room could the stitchers work throughout the whole room from back to front. The second floor has been already so narrowed by the diminished light that it is only in the window that the fine finishing work can be done. I repeat and adhere to what I said on this point in my judgment at the trial: "Defendants' witnesses admitted that a room of the kind is an essential part of a woollen or linen factory; and I did not understand anybody to suggest that this was not the proper room and floor for such a purpose, having regard to all the factory requirements."

An illustration is afforded in the arrangement of the defendants' new building. Mr. Ewing, who is practically a defendant, has arranged for himself a suitable examining-room in one of the upper chambers of this fine new building, the upper stories of which, in my opinion, injuriously affect to a serious degree the plaintiff's examining-room. Is it reasonable for Mr. Ewing, or for the Company which he has indemnified, to meet the plaintiff by telling him that he must find an examining-room elsewhere? In my belief, there is no other suitable place for an examining-room, having regard to the requirements of this small factory, and the accommodation which the building affords.

I find it necessary, for the purpose of considering whether this motion should be granted, to form some opinion on the question of damage; and my visit to this room, in which I spent a considerable time, left on my mind impressions upon this subject which cut both ways. On the one hand, I do not think that the room has been rendered wholly useless for examining purposes. I accept the evidence of defendants' witnesses, that it may, now that the wall has been faced with white, be suitable for an examining-room in a linen factory. It has occurred to me that this well-established difference between the requirements, as regards light, of an examining-room in a linen and woollen factory, respectively, may serve to explain what otherwise is difficult to understand, namely, the attitude taken up by defendants in this case. They are interested in linen, not wool, and know all about linen, and very little about woollen, factories. It is quite possible that their belief, that this building would do very little injury, was not only *bona fide*, but, from a linen merchant's point of view, founded on

Barton, J. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

grounds which were by no means unreasonable. I also think that on fine days the room is not rendered wholly useless for examining —as distinguished from buying and selling—woollen goods. The evidence is very strong that, for buying and selling, old customers will no longer resort to this room. Busy buyers will only go to the market where they can choose goods safely and suitably; and I must take it on the evidence that, unless plaintiff can arrange to do his buying and selling in the cutting-room—which, at some inconvenience, he very likely can do—old customers will leave him. But, as regards checking and examining, the worker's time belongs to his employers; and, with extra care on the part of the examiners, I dare say that on fine days the risk of mistakes will be slight, but I think it will be serious on darker days. I cannot doubt that the loss of the northern light has been a substantial loss to this room; that the bringing of this wall 15 feet nearer, and doubling its height, has sensibly darkened those windows, and that, as a result, the matching and examining will be more or less difficult, uncertain, and liable to error, according to the conditions of light from day to day. That means that this business will be liable to mistakes, and, as the trade witnesses say, to loss of customers; and that they will not be able to carry on a woollen factory so profitably as before, or to get such a good price for it for that purpose if it came to be sold.

If the only injury were the diminished light to the stock-room and to the finishing-room, I have already said that it would, in my opinion, be compensable by moderate damages. I think I had better state what is in my mind as to damages. It will enable the parties to consider their positions. If there should ever have to be an inquiry at Chambers, I shall approach the subject of damages with an open mind. But there are good reasons in a case of this kind for the parties knowing what is in the mind of the Judge; and although I have not heard much evidence specially directed to the question of damages, I have heard more evidence bearing on the subject than a Court or jury sometimes hears before fixing damages. If I had to fix damages on the evidence at the trial, without an inquiry at Chambers, I would fix at least £100 for the additional labour that will be required in the stock-room, and for the inconvenience and dislocation of space and work in the case of

the finishing-room. If there was no more in the case than that, the nuisance would be, in my opinion, reduced to dimensions compensable by damages, and not calling for an injunction, according to the rules and principles laid down by the Court of Appeal in England, in the well-known case of *Shelfer* v. *City of London Electric Lighting Co.* (1). But as regards the examining-room, I have considered the matter carefully, and I could not fix the damages in respect of that room at less than £400, if I had to fix them now without any further inquiry. This falls very far short of plaintiff's estimate of his injury; but in estimating damages provisionally, for the purpose of deciding this motion, I am taking into consideration that the premises may still be reasonably suitable for a linen factory. That circumstance, in a great linen manufacturing city like Belfast, is a matter which, in estimating the injury to plaintiff's premises, should be taken into consideration. If this matter came before a Belfast jury, which would be the best possible tribunal for such an assessment of damages, I think they would rightly take it into consideration. But I am sure that they would also recognize that a woollen business is a legitimate business, entitled to the protection of the law; that plaintiff is a woollen goods manufacturer; that as a woollen factory this business cannot be carried on by the plaintiff as profitably as before; and that the premises would be likely to command a less price on that account, if he wished to sell them and go elsewhere.

I do not find it necessary to discuss that branch of the argument of plaintiff's counsel which was founded on the observations of Lord Lindley in *Colls' Case* (2), and of Lord Atkinson in *Jolly* v. *Kine* (3), which were to the effect that in estimating the amount of light which is left to the dominant tenement, all light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account. The plaintiff has no prescriptive right in respect of the reflected light from the white verapal. I do not find it necessary to consider how far, if at all, this well-established principle has application to the facts of the present case; because

(1) [1895] 2 Ch. 287. (2) [1904] A. C. 179. (3) [1907] A. C. 1.

Barton, J. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

I think it can be decided upon much simpler grounds. I find, on the evidence of trade witnesses—*e.g.*, Stanley and Hoyle—at the trial, and of the other trade witnesses at the trial and on this motion, that this wall, whether its surface be red or white, is a trade nuisance within the meaning of *Colls' Case* (1). I find nothing in the expert evidence to lead me to reject that conclusion, and much to support it. I think the facing the wall with white has lessened, but not abated the nuisance; and, while my visit to the premises leads me to think that the examining-room has not been rendered wholly useless, as some of the evidence would suggest, I think the profitable carrying on of the business has been substantially impaired.

As the authorities stand, I do not think that I should be justified in saying that defendants can keep up their building and pay the plaintiff £500 damages. There is no doubt that the tendency of the modern cases is to go further than formerly in the direction of granting damages instead of an injunction. The observations of Cozens-Hardy, L.J., in *Kine* v. *Jolly* (2), and of Lord Macnaghten in *Colls' Case* (1), have been referred to in that connexion. But nothing that was said in those cases goes so far as to justify me in doing so in a case like the present one. It has been pointed out that Farwell, J., in *Higgins* v. *Betts* (3), evidently thought that, in that particular case, if £500 damages should be assessed, it would be a case for an injunction, not damages. There is no magic in the figure £500. But the seriousness of the injury is an important element in the case. There is also the deliberation and the full knowledge with which the defendants acted. To refuse an injunction in this case would be to recognize that the defendants had a right to compulsorily inflict this serious nuisance upon the plaintiff, upon terms of compensation to be fixed by the Court. That is a proceeding which, in my opinion, the law, as it stands at present, does not permit.

It is a serious matter to make an order that may involve the pulling down of even part of such a magnificent building as the defendants' building is. I am not aware of the existence of any more extensive building of the kind in this country. It is really

(1) [1904] A. C. 179, 196. (2) [1905] 1 Ch. 504. (3) [1905] 2 Ch. 213.

a fine edifice—a credit to its architect, and an ornament to the city of Belfast. I am glad to think that my order will only affect part of it, and that not the most important or ornamental part. But in this case the defendants do not deserve pity. They acted after full warning, and with their eyes open. There would be no protection for the smaller class of manufacturers, if I were to shrink from making the order which I feel it to be my duty to make, namely, that leave be given to issue this writ of sequestration; but, under the circumstances, I shall put a reasonable stay on the order.

Barton, J.
1907.

BLACK
v.
SCOTTISH TEMPERANCE ASSURANCE Co.

J. MAC M.

Appeal.
April 24, 25.
May 1.

The defendants appealed (1).

Gordon, K.C., Matheson, K.C., W. M. Whitaker, K.C, and *J. M. Whitaker*, for the appellants.

A. H. Bates, K.C., W. Martin M'Grath, K.C., and *J. H. Pigot*, for the respondent.

May 1.

THE LORD CHANCELLOR:—

This is a case of obstruction of light to business premises in Belfast; and the question mainly discussed in the appeal was, whether damages should be given to the plaintiff by way of compensation in lieu of the mandatory injunction awarded by Mr. Justice Barton.

We are in a more favourable position for dealing satisfactorily with the whole case than was the Judge in the Court below, before whom the case was discussed in three stages:—(1) At the trial, when the mandatory injunction was granted; (2) on an interlocutory application, when the time was extended to enable the defendants to try to remedy the injuries; and (3) an application

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

The Lord Chancellor.

for a sequestration, after the defendants had made considerable expenditure with a view of removing the injuries complained of. We are in a position to deal with the case as it stands now, having all the facts and orders before us.

The plaintiff, a Belfast merchant, is a clothing manufacturer of woollen goods, and his principal business is the making up and selling wholesale ready-made serge suits for boys. The material used is mainly dark-blue serge; and some few years ago he purchased for a sum of about £1950 premises on the north side of James's Street, South, in Belfast, consisting of, or formed into, a warehouse, a factory, and cutting-room. On the west side of plaintiff's premises there was a covered gateway and building belonging to a Mr. Ewing: a space of 15 feet separated these buildings from plaintiff's premises, and Ewing's buildings were only some 36 feet in height. The defendants bought the site from Ewing in the year 1904, for a sum of, I think, £30,000; and they subsequently erected on this site, at the cost of over £20,000, the buildings now complained of, which are 72 feet in height, and occupy the vacant space of 15 feet; and the wall opposite plaintiff's premises was faced with red brick. And so far as regards the rooms in plaintiff's warehouse afterwards more particularly referred to, in which colours and shades were to be examined and tested, the existence of this red brick on the wall was at the trial the main subject of complaint, though there was also evidence as to there being a material diminution of light.

The model put in evidence enables us to form a very accurate idea of the plaintiff's and defendants' buildings as they stood before the defendants' purchase, and also since the erection of the new ones. It is not suggested that there was any acquiescence; the defendants went on with their building under the advice of their architect that no injury would be done, but also no doubt influenced by the fact that they had covenants for title from their own vendor. Everything appears to me to have been done openly and *bona fide*.

I do not think it is material to consider minutely the evidence given at the trial, having regard to what in result the question for our decision has become; and whenever any standard of right to light arises, I think that the rule to be applied should be that

adopted in the recent case of *Jolly* v. *Kine* (1) by Lord Loreburn: that the plaintiff "obtains a right to so much light under his easement as will suffice for the ordinary purposes of inhabitancy or business, according to the ordinary notions of mankind, having regard to the locality and surroundings."

I do not think an elaborate examination of the facts and evidence is necessary. I shall state them shortly as far as they appear to me material.

The plaintiff's premises consist of five rooms in a building running north and south, and the light affected is a northern light, and there are five windows on each of the four floors, which rise one above the other. The building is 44 feet wide. Each room is 12 feet high, and the floors extend about 54 feet to the south, on which southern side there are also corresponding windows with a southern aspect, admitting a through light which is, of course, diminished by reason of the rooms being low, as compared with their length.

The rooms have been used by the plaintiff in his business for different purposes. On the ground-floor there is the stock-room, which communicates by a door with a room called the cutting-room, which has a glass roof. There was evidence that this stock-room was used to select bales of goods which might be required for manufacturing purposes, for comparing cloth with samples, and that in consequence of the diminution of the light they had to be carried into the cutting-room for examination. The cutting-room in the courtyard is used for cutting up goods with machine-knives into boys' suits, and also for matching colours and sorting goods for making up. The evidence at the trial was that, owing to the height of the wall raised opposite the cutting-room, and especially the red-brick facing of the wall, the light was no longer suitable for matching or sorting, or distinguishing texture or colour. The top floor—the sewing-machine room—is that to which the goods, when cut up and sorted, are sent up by lift for the purpose of being stitched together by the workers employed—some fifty in number. The room below this is the finishing-room on the second floor, where the suits stitched above are finished

(1) [1907] A. C. 2.

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

The Lord Chancellor.

and pressed. The examining-room, below this on the first floor, is the one to which the evidence was principally directed, both at the trial, and on the further hearing on motion. It is in this room most of the matching of colours and examination of goods and suits for defects of colour or texture is done, after the goods have left the finishing-room. Two windows on this floor were used for the purpose, and there was a considerable body of evidence that material injury and inconvenience to plaintiff's trade was caused in this room by the erection of defendants' buildings, in which evidence the existence of the red brick was a main factor. The learned Judge reserved his opinion as to what would be the effect of substituting white brick for the red, both as to altogether doing away with the cause of action, and also as to the question whether damages could be given in lieu of an injunction, and he says—"In view of that possibility I shall not for the present grant a mandatory injunction to pull down this building." To meet this view he, by his order of 25th June, extended the time for the operation of the judgment of 3rd March until the 1st October. The defendants, profiting by the opportunity thus offered to them, expended a sum of over £200 in facing the red-brick wall with a white glazed tile called verapal; and when the application was made by the plaintiff for a sequestration to enforce the order for an injunction of 3rd March, they contended that the effect of their acts and expenditure had been altogether to do away with the existence of any actionable nuisance, or at all events so to alter it in character that compensation in damages only should be granted. The learned Judge, after hearing the evidence given on affidavit, visited the premises in Belfast, and he arrived at certain conclusions of fact in reference to the different rooms dealt with in his judgment of 3rd March, from the effect of which judgment he manifestly found it difficult to escape. I express no opinion as to what my view would be if we were hearing the case as on the 3rd March, but we are in a very different position now. As regards the stock-room, he finds that there was still a change of light which deprived it of what was one of its reasonable and appropriate uses, and would cause some additional labour, or workmen's time, but that if the injury to this room stood by itself, it would be a matter compensable by moderate damages. As regards the cutting-room, he came to the

conclusion that the injurious effect of the defendants' acts had been obviated by the substitution of glazed white bricks.

As regards the sewing-machine-room, he finds that there had not been any such darkening of this room as would amount to a nuisance, but that its available space had been diminished by a large table being moved up from below, owing to the darkening of the room below. He finds in respect of the finishing-room, that part of it had been put out of use from the necessity of shifting tables, and that the finishing work had to be done partly in one room and partly in another instead of in the one; but that the injury would be compensable by moderate damages. But it is upon the effect of defendants' building on the examining-room that the learned Judge really rests his adherence to the principle of his judgment of 3rd March. He examines the evidence on the affidavits, and his conclusion is summed up in the following passage:—"I think the facing the wall with verapal has lessened but not abated the nuisance; and while my visit to the premises leads me to think that the examining-room has not been rendered wholly useless, as some of the evidence would suggest, I think the profitable carrying on of the business has been substantially impaired."

In my opinion, the plaintiff has been inconvenienced in the carrying on of his business, and will be at some expense in making altered arrangements by reason of the effect of the defendants' buildings; but I am satisfied that his trade can profitably continue if he makes some expenditure.

Mr. Justice Barton estimates the money damages in respect of the examining-room and other rooms at £500 in all, and obviously arrives at the conclusion that where the damages would be so considerable as £500 he would not be justified in refusing a mandatory injunction.

I do not think this can be a universal test to apply in considering the application of damages as a remedy instead of an injunction, though the amount of damages will be always an important factor.

It must be remembered that in order to raise the question of damages or injunction, material injury must exist and be found. If the subject be an occupied dwelling-house, and the

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

The Lord Chancellor.

acts seriously interfere with the future occupation by the plaintiff and his family of the dwelling-house, the defendants will not be permitted to buy him out by a sum of money; and if the subject be trade premises, the defendants cannot buy the right to stop the trading; and the same principle would apply where the acts done would take away a property such as a necessary right of passage: *Krehl* v. *Burrell* (1). But where that trading can and will continue, as I think it can here, though with some inconvenience or dislocation of the business, or expenditure in the alteration of a window or windows, I think the judicial discretion under the statute may, in the absence of special circumstances noted in some of the cases, be exercised to give full and adequate compensation in money for a pecuniary loss affecting a continuing trading, while refusing the mandatory injunction.

I do not think the Judges have been quite consistent in the exercise of this judicial discretion; but it may, in my opinion, be safely said that the tendency has lately been in the direction of giving damages, where that remedy would be adequate and consistent with the leaving plaintiff in possession of his property. As over and over again said, no certain rule can be laid down for the exercise of the judicial discretion. It must depend upon the special circumstances of each case: see *Aynsley* v. *Glover* (2). I am disposed to think that the cases for the application of the rule at the present time are correctly stated by Mr. Justice Pearson in *Holland* v. *Worley* (3), where he says—"If the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation which could be given to the plaintiff would be to compel the defendant to purchase his property out and out, the Court will not, in the exercise of the discretion given it by Lord Cairns' Act, compel the plaintiff to sell his property to the defendant. But in other cases, where the injury to the plaintiff would be less serious, when the Court considers that the property may still remain the plaintiff's, and be substantially useful to him, as it was before, and the injury,

(1) 7 Ch. D. 551. (2) L. R. 18 Eq. 542. (3) 26 Ch. D. at p. 587.

therefore, is one of a nature that can (without taking away the plaintiff's property from him) be compensated by money, then the Court, if it thinks right, may exercise the discretion given it by the Act."

The observations of Lord Macnaghten, in *Colls* v. *Home and Colonial Stores* (1), are very valuable to show that he disclaims the idea that the amount of damages is a satisfactory test. He gives instances there where he considers an injunction should be granted, which do not, I think, exist in the present case. The last spoken word on the subject is that of Lord Justice Vaughan Williams, in *Kine* v. *Jolly* (2) :—"Then, one has to consider whether there ought to be damages, or a mandatory injunction. With regard to that I propose to apply either the test laid down by Lord Macnaghten in *Colls* v. *Home and Colonial Stores, Limited* (1), or that laid down by A. L. Smith, L.J., in his judgment in *Shelfer* v. *City of London Electric Company* (3). It seems to me here impossible to say that there ought to be any injunction upon the ground that the defendant has acted in a high-handed manner, or has shown a desire to steal a march upon the plaintiff, or to evade the jurisdiction of the Court. I think—and I wish emphatically to state this—that both parties here honestly acted in accordance with what they believed, and not unreasonably might believe, to be their legal rights. Nor do I think that there is any ground for the suggestion that the plaintiff has lost her right to an injunction by reason of delay."

The learned Judge there held that damages were the appropriate remedy, and not a mandatory injunction.

I do not think the defendants here acted in a high-handed manner. They were *bona fide* advised by their architect that no injury would be done. The question seems to me to be, Can the injury, having regard to its nature, be fairly compensated by damages? I think it can. The plaintiff is entitled to have his damage assessed by an inquiry; and we have neither the power nor the desire to deprive him of that right. The defendants have offered to leave the determination of the damages to us, and the sum has been suggested which appeared to be a liberal estimate viz. £500.

(1) [1904] A. C. at p. 192. (2) [1905] 1 Ch. 495. (3) [1895] 1 Ch. 287, 321.

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

The Lord Chancellor.

We cannot, as I have said, prevent the plaintiff seeking larger damages through an inquiry; but we can state, in granting an inquiry, that the defendants have offered this sum, and reserve the costs of the inquiry to be determined by the result. As regards the costs of appeal, the defendants have served a notice of appeal which asks to have the action dismissed. This notice is wholly unsustainable; and therefore the defendants must pay the whole costs of the appeal.

FITZGIBBON, L.J.:—

I concur with the Lord Chancellor.

A substantial cause of action has been proved, in the diminution of light to an actionable extent. Relief is therefore due to the plaintiff; but the question remains whether he is entitled, as of right, to the specific relief of having the defendants building pulled down, or whether he must be satisfied with the exercise by the Court of the power to award him pecuniary compensation.

I hold that we should be bound to give the specific relief, if damages did not afford adequate compensation; the question, in my opinion, is whether, having regard to all the facts, and in the exercise of a judicial discretion, we are satisfied that money compensation, duly ascertained as against a party who is legally in the wrong, will place the defendant, substantially and pecuniarily, in a position as good as that which he had before the defendants interfered with him.

For myself, I wish to say that I think equity should be very slow to act upon the principle of giving specific relief which would not otherwise be given, on the ground that the defendant had been guilty of "high-handed conduct." Such action savours of "vindictive damages." But I think that principle has no application here; it is directed against those who wilfully and knowingly violate the rights of others, reckless of consequences, and "at their peril," doing mischief with the intention of leaving the injured party no voice in determining whether it shall be undone, as distinguished from being paid for.

In this case I am satisfied that neither party was "high-

handed" in that sense; each believed in his legal right to do what he did; the defendants went on "at their peril," under the honest belief, founded on expert opinion, that what they were doing would not give any cause of action, but the "peril" of being wrong in the result was that of having to provide the appropriate remedy, and that remedy cannot be made more severe merely because the defendants under-estimated the effects of their acts upon the plaintiff.

My reasons for thinking that money will place the plaintiff, substantially, in as good a position as heretofore, are founded on considering the peculiar circumstances of the case. The degree of interference with the plaintiff's light is of great consequence. Upon the evidence, it appears to come almost upon the border-line of interference, not with the quantity of light generally sufficient for ordinary purposes, but with the use of a particular kind of light for a special purpose. The plaintiff's witnesses make a great grievance of the interference with the *northern light*: great artists prefer studios with a northern light; but as regards the necessity of that light for the special purpose of examining the plaintiff's serges, I find some symptoms of exaggeration, usual and no doubt innocent, in the present case.

Then as to the quantity of interference, and the means of remedying it; there are five windows on each floor; the windows farthest from the defendants wall are blocked up with necessary offices which might be shifted to the darker side, where the light is now used, and is admitted to be sufficient, for lighting a staircase. Barton, J., does not appear to think that any actionable interference took place on the top floor, nor much, if any, on the ground floor; the main cause of action is limited by him to three windows on each of two floors, and he has put four-fifths of his estimate of the damages on two of these windows, and seems to think £100 enough to cover all the rest.

Let us see what money can do. In the first place, by the simple and cheap device of placing a steel girder across the three windows on each floor, and turning the whole space into glass, an amount of additional light would be admitted, much greater than the amount which has been taken away, even from the windows on which £400 have been assessed.

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

Fitz Gibbon, L.J.

Besides, we have evidence that the fixtures inside the windows, upon which these delicate operations of examining the serges are performed, are not in the best place, or of the best construction, for using the existing light to the best advantage.

Again, by a re-arrangement of the departments on the different floors, the upper floor being uninjured, suitable places where the customers might choose goods, and where the sellers could test and examine them when customers were not there, could be provided. It is also to be remembered that each floor has uninterrupted light from the south, and that the allocation of different parts of each floor to the most suitable purposes would mitigate much of the present inconvenience. On the whole, I am satisfied that any inconvenience which has been caused is capable of being greatly diminished by alterations in small matters, and by re-arrangements which a comparatively small amount of money, judiciously used, will effect. Of course the plaintiff will also be entitled to compensation for past inconvenience or loss and for any further inconvenience which may still remain, and to have the damages capitalized for any depreciation in the value or utility of his premises, as altered; such for example as the necessity of going up more stairs, or using a lift, or providing more artificial light.

In the exercise of our judicial discretion I do not think it right to leave out of consideration the course of the litigation, because it would look to me very like the disappointment of a fairly entertained expectation, if not almost a breach of faith, now to give a mandatory injunction against the defendants, after they have expended so much time and money in mitigating the damage. I cannot see the consistency of making such an order now, at the end of the case, when it was not made at the beginning. A chief complaint at the beginning was the discoloration of the light; the Court held that there was then an actionable wrong, but refused to grant a mandatory injunction, and thus encouraged the defendants to incur expense in removing that cause of complaint by covering their wall with white enamel. I cannot think it fair, from the defendants point of view, after allowing such an experiment to be tried, afterwards to hold, although the discoloration has been removed, and there has been a great mitigation of the

obstruction of light also, that the whole building, with the new work, must come down. We have now to do with a much mitigated injury, and that it has been mitigated is a strong corroboration of the justice of holding that compensation is now the proper and adequate remedy. We have no longer to deal with discolored light, nor with people who have refused to do anything reasonable, but with defendants who have expended a considerable sum, practically at the invitation of the Court, upon expensive work which they would have to pull down if the mandatory injunction were allowed to stand. I am not impressed by the suggestion that the white enamel has aggravated the injury by making the light too "dazzling."

Lastly, the locality is, in every such case, to be taken into account, and it is here, in my opinion, very important in determining the relief that should be given. The plaintiff's existing building belongs to a bygone generation ; it is practically certain to be rebuilt within a short time, and made more worthy of what has recently become one of the most important sites in Belfast. The effect of granting a mandatory injunction would be to put into the hands of the plaintiff the means of, in effect, selling the relief at a price far beyond its value. If the mandatory injunction was affirmed, it is almost certain that the building would not come down, but the plaintiff would obtain a sum measured by the cost of taking it down. We ought not to enable that to be done ; so far from compelling the plaintiff to sell his premises, or enabling the defendants to acquire them by compulsion, we would force the defendants to pay a sum measured by their loss, and not as adequate compensation for the injury done by them. By measuring that compensation reasonably and liberally as against the party legally in the wrong, we do justice to both sides.

It is my duty to express my own opinion as to this matter of damages for the assistance of the parties. Barton, J., mentioned the sum of £500. The defendants consented, and, in fact, requested that we should fix the amount upon the materials before us, including the estimate of Barton, J.

We have no sufficient materials for assessing the damages on our own judgment; we cannot deprive either party, except by

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

Fitz Gibbon, L.J.

consent, of an enquiry upon which legal evidence of the damage can be given on each side; but the consent of the defendants enables us to treat them as willing to submit to our making an order that they shall pay £500 as damages.

On the evidence, as it stands, we cannot decide the matter one way or the other; but the sum is a large one. I do not think that the damages can be properly ascertained by putting £400 on any one window, or £100 on all the rest of the premises. To fix the damages, there should be a detailed consideration of the depreciation of the plaintiff's interest in the buildings (which cost £1900) caused by the defendants works, and of the inconvenience suffered, and of the diminution of the profitable utility of the premises for the ordinary purposes of trade. They have not been rendered unfit for any trade; they still enjoy a considerable access of light at the back, and they have uninterrupted light in front. How far alterations and re-arrangements can make good the injury should also be considered, with the best means of effecting this, and the cost of doing it; all these are matters for enquiry, and for evidence on both sides, and an enquiry will be a costly process. We will show on our order that the defendants were willing to submit the assessment of the damages to us, and that we were willing to assess them at £500. We will give an opportunity to the plaintiff to consider whether he will take a decree for that amount, with his costs here and below. He can take his experts into consultation, and make up his mind whether he will take it or not, and if he requires an enquiry he shall have it, but on the same conditions as if £500 had been now lodged in Court by the defendants. The result of the enquiry, and the costs of it, will depend on whether the damage is ultimately found to be above or below that sum when all the points as to diminution of light and soforth have been duly taken into account on evidence. The plaintiff may, perhaps, get more, but, on the other hand, he may get less.

HOLMES, L.J. :—

The evidence, expert and otherwise, given at the trial of this action was, as often happens in cases of this kind, conflicting, and I fear that the witnesses on both sides indulged in considerable exaggeration. At the same time, I have no difficulty in holding that the buildings erected by the defendant Company deprived the house in which the plaintiff carries on his business of light, to which it was entitled, to such an extent as to constitute an actionable wrong. My principal ground for this conclusion is to be found in the physical features of the respective premises before the defendants' work began, as compared with them after the changes were made. The old building, the place of which has been taken by an erection of unusually large dimensions, was comparatively small, being only 37 feet high, and stood at a distance of 15 feet from the adjacent premises. Now the gable of the latter is actually touched at right angles by portion of the new building, rising to a height of 72 feet, and necessarily cutting off a considerable quantity of lateral light which formerly reached the plaintiff's northern windows.

But while I am of opinion that the plaintiff has made good his cause of action, I am disposed to think that the injury done him is not so serious as Barton, J., seemed to regard it when delivering judgment in the action. The impression produced by that judgment on my mind was that the loss of light was such as either to make the plaintiff's premises wholly unfit for business purposes, or, at least, to cause him the greatest inconvenience in all branches of his trade. I think that the evidence does not justify this view of the case; and I further think that the Judge modified his first impressions after he had, with a praiseworthy disregard of his own convenience, inspected the place.

There are in the house five rooms in all—the stock-room and the cutting-room on the ground floor, the examining-room on the first floor, the finishing-room on the second floor, and the sewing-machine room on the third. Of these departments the light in the cutting-room and the sewing-machine-room is not substantially interfered with. The work done in the store-room and the finishing-room will require some re-adjustment, in consequence of their being somewhat darker than before; but, as Mr. Justice Barton,

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

Holmes, L.J.

after his inspection, thought that £100 would be sufficient compensation therefor, the injury is but small. There remains the examining-room, in which the finished goods are subjected to examination before they are placed in stock. This seems to me to be at present a reasonably well-lighted apartment, for, in addition to four windows to the north, it has five southern windows. It is said, however, that the work of examining requires a northern light, and it has hitherto been done at a table close to one of the northern windows. I confess that I am somewhat sceptical as to the necessity of a northern light for this purpose. The inspection of a garment made of very cheap woollen fabric, generally blue in colour, is not a very delicate operation, and hardly needs the steady, subdued light of an artist's studio; and I should think light from the southern sky, shaded where necessary with blinds, would be sufficient for the detection of defects. But if I am wrong in this, sufficient light could be obtained from the north at comparatively small expense, by enlarging or adding to the windows. Mr. Justice Barton assesses the damages to this room at £400—no very startling sum.

The foregoing observations are preliminary to my dealing with what I regard as the only point of the appeal—whether the plaintiff is entitled to a mandatory injunction, or to an award of damages. Barton, J., does not seem to have given much consideration to this question at the trial, although I think his leaning was to the injunction; and he certainly took this view on the hearing of the subsequent motion. The matter is of great importance, and calls for careful consideration.

In former times the relief given in this kind of action was an injunction, directing the removal of the cause of the wrong or nuisance complained of; but Lord Cairns' Act was a legislative declaration that in some cases the award of damages would be a more appropriate remedy. Courts of law, however, like other institutions, are slow to break with old traditions; and for some time there was great hesitation in making use of the new power conferred on them. Latterly, the tendency has been in the other direction; and I think it a good tendency, which I hope will develop. I should like, however, to see the old form of judgment adhered to where the defendant has been guilty of misconduct or

a wanton and oppressive disregard of the plaintiff's rights. Mr. Justice Barton, in his first judgment, while not actually saying that the defendants' conduct was high-handed, held that they had acted very deliberately, and with their eyes wide open. This opinion he subsequently modified. In the sequestration motion he said that the attitude of the defendants could be explained by the fact that, while knowing all about linen, they knew little about woollen, factories, adding that it is quite possible that their belief that the new building would do very little injury was not only *bona fide*, but, from a linen merchant's point of view, founded on grounds which were by no means unreasonable. I agree in this; and I therefore put aside all suggestion of high-handed and oppressive action.

The only question remaining is, whether an award of damages would compensate the plaintiff. In a case where a dwelling-house is rendered uninhabitable, or business premises unfit for trade, I think that damages would be an inadequate remedy; so, also, where the injury complained of takes away or destroys the plaintiff's property, entirely or in part. But if this is not so, a mandatory injunction may work great hardship. In the development and improvement of cities, now so general, a man erects a beautiful edifice, which, without any bad faith on his part, turns out to be, to some extent, an injury to a neighbour, but an injury for which money compensation is an adequate remedy. If, in these circumstances, a mandatory injunction is given, it may be made the instrument of gross injustice. Thousands of pounds, by a kind of legalised blackmail, may be enforced for a wrong for which a payment of hundreds would be extravagant. For these reasons I welcome the tendency to substitute damages for injunctions; and I have noticed with satisfaction that plaintiffs in these actions often prefer to have damages assessed once for all, than which there can be no better evidence of that remedy being often satisfactory. Mr. Justice Barton, on the motion for sequestration, named £500 as the amount of loss sustained by the plaintiff. This sum was only a loose estimate; and I gather that his reason for making it was to show that the injury was of such a character as to call for an injunction. There is, I know, a prevalent idea that, while it is quite legitimate to award £250 or £300 in an

Appeal. 1907.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

Holmes, L.J.

action for interference with a right, any greater loss is beyond the region of damages. I know of no authority for this notion. Whether damages should be given in substitution for an injunction does not depend upon their amount, but upon whether they are full and adequate compensation. Believing that they will be so in this case, I am of opinion that the judgment in the action ought to have directed an inquiry as to the amount of damage, past and prospective, caused to the plaintiff's premises by what was done by the defendant Company, and to have awarded him this amount in satisfaction of his cause of action.

Had the defendants appealed on the ground that the suitable remedy had not been given, they would have been entitled to the costs of the appeal, while paying the costs of the action. But, instead of doing so, they took certain steps, in which they failed, and, in my opinion, rightly failed. Then came their appeals, challenging the right of the plaintiff to any relief. In this contention they have also been defeated; and although they have gained in this Court what I have no doubt is an advantage, I fear that they must be held responsible for all the proceedings, and must bear the costs thereof.

I should be glad if further litigation could be avoided by the plaintiff accepting the sum of £500, at which Barton, J., was disposed to measure the damages, and to which the defendants do not object. The plaintiff has, however, a right to an inquiry, as to the result of which I only say that I am not in a position to speculate. He may recover more, but he is just as likely to recover less, than £500; and if the amount is no more, the costs of the inquiry ought to be borne by him.

R. ST. J. C.

The plaintiff appealed to the House of Lords (1).

Upjohn, K.C. (of the English Bar), *Bates, K.C.*, and *J. H. Pigot*, for the appellant.

Matheson, K.C., *Astbury, K.C.* (of the English Bar), and *J. M. Whitaker*, for the respondents.

LORD LOREBURN, C. (2):—

My Lords, if this were a question of discretion, I should feel almost insuperable difficulty in differing from the eminent authorities of the Court of Appeal in Ireland, but the facts, either undisputed or indisputable, remove this case from the realm of discretion.

The plaintiff owns a property of about £2000 in value, in respect of which there was an easement for light; that easement is as much property as anything else. The defendants, his neighbours, had bought adjoining land, with an indemnity from their vendors, which they considered enabled them to invade the plaintiff's easement at someone else's expense. Whether this indemnity was given by covenant that there were no easements affecting his light, or in some other way, is indifferent. The point is, that they thought they were indemnified, and said so. They then proceeded to make out plans which would result in the invasion of the plaintiff's easement. He warned them over and over again. He refused to entertain compensation, and said throughout that he possessed the right, and would enforce it. He was met by statements from the defendants to the following effect:—"We are indemnified; you must settle matters with our vendor; we can do nothing, and shall proceed to build." Upon this the plaintiff brought the action. He did not apply for an interim injunction, very sensibly, I think, because he would have been obliged to give an undertaking as to damages which might have proved ruinous if his case failed. He was not bound to stake his all, or indeed, anything, on the possibility of error or

(1) Before LORD LOREBURN, C., LORD ROBERTSON, and LORD COLLINS.

(2) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

H. L. 1908.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE CO.

Lord Loreburn, C.

mischance at the trial. He was entitled to await the trial, especially as he was not the aggressor, and was merely resisting a high-handed claim to defy his lawful rights.

Accordingly, the defendants proceeded to build, and completed their structure. At the trial, which we were told lasted twelve or thirteen days, every point appears to have been fought. I will not say that I suspect the object of the defendants to have been a wearing down of the plaintiff; but they must have foreseen that this might be the result of so costly a litigation. Unless a litigant's means are ample it requires no ordinary nerve to encounter such a litigation as this for a cause comparatively so small.

In my opinion the order must go as propounded by Mr. Justice Barton. Whatever the consequences may be in loss of money, the defendants have no one to thank but themselves, and must abide the penalty of their conduct.

I regard this as a case in which they have deliberately, and after repeated warning, inflicted a substantial wrong upon another man, knowing that it is a wrong, with a view simply to their own advantage, and in contempt of their neighbour's lawful rights.

In such circumstances I think that the order for which the plaintiff asks cannot be refused.

LORD ROBERTSON :—

My Lords. If this were an ordinary circumstantial question of discretion, I should be slow to interfere with the decision of the strong and experienced tribunal which disposed of it. But, in my view, the salient facts of the case mark it out as raising considerations of principle, and I am unable to reconcile myself to the conclusion arrived at in the Court of Appeal.

The common basis of fact, on which the argument on either side proceeds, is, that the respondents have committed an actionable wrong by building as they have done; for the contention of the respondents is, that an award of damages is the appropriate result of the case. Now, I must say that a great deal of the respondents' argument at the Bar was made up of topics entirely superseded by this condition of the debate.

It is on the footing of the law laid down in *Colls' Case* (1) that it is ascertained in the present case that there is an actionable wrong; and the only question is, whether damages or a mandatory injunction is the appropriate remedy.

Now what seem to me the two material facts in the case are, first, that the injury is substantial, and also not merely incidental to the proceedings of the respondents, but their necessary consequence; and, second, that those proceedings took place deliberately, and against the protests of the appellant.

It is impossible to disregard the fact that, while the value of the appellant's building is some £2000, the Judge who tried the case estimated the damage at £500, and this estimate was assented to by the respondents.

The case was somewhat complicated by the fact that originally the walls facing those of the appellant's windows which were principally obstructed were of such a hue as to discolour as well as diminish the light. The learned Judge gave the respondents the opportunity of mitigating the injury by altering this; they faced the walls with white tiles, and it is with full regard to this amelioration that Mr. Justice Barton came to his conclusion.

It was suggested, indeed, that the discolouration had been throughout the gravamen at the trial, and that the judgment was really rested on affidavits. On this it is to be observed, not merely that the affidavits were not objected to, and no application was made for cross-examination, but that the learned Judge had arrived, on the evidence given at the trial, at the conclusion that there was an actionable diminution of light. Nor would the Court have been warranted in holding that an actionable obstruction of ancient lights could be justified by the substitution of light reflected from a white surface, when the injured owner had no legal right to the continuance of these newly created conditions.

Turning now to the conduct of the respondents, it appears, on the face of the correspondence, that they did not deny that their buildings would diminish the appellant's light, although they affected to belittle the diminution, as estimated by their architect.

(1) [1904] A. C. 179.

H. L. 1908.

BLACK v. SCOTTISH TEMPERANCE ASSURANCE Co.

Lord Robertson.

It is to be observed, however, that they had provided for the event by taking covenants from their seller, which amounted to an indemnity; and they answered the very appropriate and vigorous protest of the appellant by referring him to their indemnity. Further, it is not suggested that they were misled by their architect as to the plans—the building was built as it had been intended—and the result is as found by the learned Judge, and as exhibited in the model. The effect on the appellant's lights is unequivocal.

This is not, therefore, a case in which the aggressor can excuse himself by pardonable error. Nor will it do to say that as, according to the law settled in *Colls' Case* (1), it is not every diminution of light that is actionable, therefore a neighbour is now free to diminish his neighbour's lights to a substantial extent, on the chance that he may at a trial make out the diminution to be on the safe side of actionable. The most that can be said for anyone who adopts this course is, that he backs his luck, and must be held to have foreseen and intended to violate his neighbour's rights, if, in the sequel, this is found to have occurred.

The facts of the present case seem to me to show no circumstance entitling the respondents to suggest the less stringent of the remedies available to the Court for the redress of actionable wrong. But I must add that some of the considerations advanced in the judgments under review seem to me to make their decision one of dangerous example. I do not think that sufficient weight is given to the deliberate action of the respondents in doing what has caused the injury, the remedy of which is now in question; and it is their own fault if their perseverance has rendered expensive the redress of the wrong. Again, the fact that the appellant's right is not to tangible property, but to a reasonable quantity of light, does not exempt offenders against that right from the more drastic remedies of the law. But, beyond this, I do not think that such rights of private proprietors ought to be the less rigorously protected, because in the particular locality in which they are situated, sagacious observers regard their buildings as destined, in the course of events, to yield to a current of

(1) [1904] A. C. 179.

improvement. It is the existing condition that determines the measure of the inhabitant's rights; and the fact that his neighbours have recently built better houses than his own does not force him to elect between conformity to their standard and forfeiture of his rights. The real truth is that what has been done here is compulsory taking without an Act of Parliament. This is illegal. Some conjectures, which I have no doubt are very shrewd, have been made by the learned Lords Justices, as to the motives of house-owners who do not fall in with such changes, and stand on their rights. But I do not think, even assuming all this to be accurate, that Lord Cairns' Act is legitimately used to clear the course of such recusants.

I am for allowing the appeal.

LORD COLLINS:—

My Lords, I have had an opportunity of reading in print the opinions that have just been delivered, and I entirely agree with them.

Questions put:—

That the order appealed from be reversed.

The Contents have it.

That the order of Mr. Justice Barton be restored.

The Contents have it.

That the respondents do pay to the appellant his costs here and below.

The Contents have it.

Agents for the appellant: *Blundell, Gordon, & Co.*, for *H. & W. Mahaffy.*

Agents for the respondents: *Metcalfe & Sharpe*, for *Johnstone & Walkington.*

Ross, J.
1908.

June 10, 16.

Appeal.
Nov. 20.

WORKINGMAN'S BENEFIT BUILDING SOCIETY *v.* DIXON AND THE ULSTER BANK, LIMITED.

Priorities—Equitable mortgagees—Negligence in allowing mortgagor to obtain possession of title-deed—Notice—Building lease—Custom of estate to withhold execution of lease till after completion of buildings.

In 1894 the defendant D. made a proposal to the lessors, to take certain lands on a building lease. The proposal having been accepted by the lessors, D. went into possession of the land, but there was no document accepting the proposal, the custom on the estate being to execute the leases only after the buildings were erected. In 1900 a mortgage of the premises was executed by D. to the plaintiffs, to secure a loan, and the mortgage was registered on the 14th September, 1900. On the 14th July, 1902, the lessors executed to D. a lease of the premises for 150 years, from the 1st May, 1894; and, on the 7th May, 1903, D. obtained possession of the lease from the lessors' solicitors. On the 5th May, 1903, the plaintiffs wrote to the lessors' agents, informing them of their equitable mortgage, and asking that the lease, when executed, should be sent to them; but they received no answer to this letter, and were not informed of the lease being executed and handed to D. On the 20th January, 1904, D. deposited the lease with the defendants, the Bank, to secure a loan, producing to the Bank at the same time a receipt for rent as from 1897. The Bank made no inquiry, and searched only from January, 1902. In 1906 the Bank, after they had received express notice of the plaintiffs' equitable mortgage, took a legal mortgage of the premises from D.

The premises having been sold, and the proceeds being insufficient to pay both the plaintiffs and the Bank in full :—

Held, by Ross, J., that the plaintiffs' neglect to get possession of the lease was not such gross negligence as to deprive them of their priority.

Held, further, that the Bank were not in any better position by reason of their legal mortgage, they having taken it after receiving notice of the prior equitable charge, and with the knowledge that their mortgagor was a trustee for the plaintiffs.

Decision of Ross, J., affirmed by the Court of Appeal.

ACTION brought by the plaintiffs for a declaration that under and by virtue of an indenture of mortgage dated 22nd August, 1900, and made between the defendant, George Dixon, of the one part, and the plaintiffs of the other part, the premises comprised in the said indenture, and situated at Spencer Road, Glenageary, in

the county of Dublin, were well charged in favour of the plaintiffs with the sum of £306 18*s.* 10*d.*, being the balance due on the said mortgage, and a declaration that by virtue of the said mortgage the plaintiffs were entitled to be paid the said sum in priority to any claim by the defendants, the Ulster Bank, Limited.

The defendants, the Ulster Bank, Limited, by their defence, set up an equitable mortgage of the premises on 20th January, 1904, and a legal mortgage dated 28th September, 1906, in priority to the plaintiff's mortgage.

The facts are fully set out in the judgment of Ross, J.

Serjeant O'Connor, K.C. (with him *Powell, K.C.*, and *Timothy Sullivan*), for the plaintiffs :—

The Ulster Bank made no inquiry when they took their equitable mortgage. They were put on inquiry by the statement on the face of the lease that the lessee had an interest in the premises from 1894. They had also before them a receipt for rent showing that rent had been paid by the defendant, Dixon, for five years prior to 1902. The Bank had implied notice in 1904, and actual notice in 1906, when they took the legal mortgage from Dixon. The plaintiffs did all in their power to procure the lease from the lessors' agents. When Dixon went into possession of the premises in 1894, he had specific interest in specific property, capable of being described in the memorial, and capable of registration: *Cleary* v. *Fitzgerald* (1). The plaintiffs are entitled to priority owing to their prior registration.

S. L. Brown, K.C., *Chambers, K.C.*, and *Charles Murphy*, for the defendants, the Ulster Bank, Limited :—

The plaintiffs had a priority over the Ulster Bank, but have lost it by gross negligence. The plaintiffs knew that Dixon would get the lease only on the completion of the building. They knew that the building was completed in 1901, and that Dixon was entitled to his lease. They took no steps from 5th May, 1903, until twelve months after the lease had been deposited with the Ulster Bank : *Greer* v. *Greer* (2). This is a contract between two

(1) 5 L. R. Ir. 351; 7 L. R. Ir. 229. (2) [1907] 1 I. R. 57.

Ross, J. 1908.

WORKING-MAN'S BENEFIT BUILDING SOCIETY v. DIXON AND ULSTER BANK.

persons having an equitable estate, one of whom has got up the legal estate: *Taylor* v. *Russell* (1). The Bank did not effect a merger by taking their legal mortgage, which does not prejudice their rights as equitable owner: *Re Smallman's Estate* (2). *Re Lambert's Estate* (3).

Timothy Sullivan, in reply :—

It was the duty of the Bank to search back to 1894. As regards the legal estate, Dixon was a trustee for the plaintiffs, and therefore *Taylor* v. *Russell* (1) does not apply.

June 16.

Ross, J. :—

The only matter left undetermined in this action is a question of priority as between a charge of the plaintiffs and a charge of the Ulster Bank. The premises have been sold, but have not realized enough to satisfy the claims and costs of both chargeants.

On the 28th June, 1894, the defendant George Dixon signed a proposal to take from the Earl of Longford and Lord de Vesci a plot of ground in Spencer Road, Glenageary, for a term of 150 years, from the 1st May, 1894, at a rent of £3 2*s.* 6*d.* The proposal contained a term that the defendant George Dixon, who is a builder, would erect within a year one house, at a cost of at least £500. No agreement was signed by the lessors; but the proposal was accepted. It seems to have been the custom on the estate not to give the lease until the building was completed. The lessee entered into possession, and the house, 19, Spencer Road, Glenageary, was erected, but was not completed until early in the year 1902, or thereabouts. No question was raised by the lessors in respect of the failure of the lessee to complete the work within the time originally specified.

In the year 1900 the lessee applied to the plaintiffs for the loan of £400, to enable him to complete the building. The plaintiffs agreed, and the lessee executed a mortgage of the premises, dated the 22nd August, 1900, for the £400, repayable by instalments as provided by the deed. The mortgage was duly registered

(1) [1891] 1 Ch. 8; [1892] A. C. 244. (2) I. R. 2 Eq. 34.
(3) 13 L. R. Ir. 234.

on the 14th September, 1900. On the 14th July, 1902, the lease was executed; and on the 7th May, 1903, the lessee obtained it from Messrs. Reeves, the lessors' solicitors, on payment of their costs for its preparation and registration. Messrs. Stewart & Sons are the agents of the lessors; and, on the 5th May, 1903, they received a letter from the plaintiffs, requesting Messrs. Stewart to let them have this lease when completed, along with certain other leases, as they were mortgagees of the premises. It appears that their letter was not answered, and the plaintiffs were not informed that the lease had been executed, and was about to be handed to the lessee.

On the 20th January, 1904, the lessee deposited the lease with the Ulster Bank, by way of equitable mortgage, to secure moneys due or thereafter to be advanced. On the 25th January, 1904, the Bank sent the lease to Messrs. Stewart, requesting an indorsement, that the building covenant had been satisfied. The indorsement was made, and the lease returned. At the time of the deposit the lessee did not inform the Bank of the mortgage to the plaintiffs. The plaintiffs were informed on the 25th June, 1906, by a letter from the lessee's wife, that the lease was deposited with the Bank, and requesting them to put the house up for auction. Thereupon, on the same day, the plaintiffs wrote to the Bank, inquiring if this was so, and what was the amount of the Bank's claim. They intimated that they were about to put the property up for public sale. The Bank replied, on the 26th June, that they were unable to give the information sought, unless instructed to do so by the lessee. On the 28th September, 1906, the lessee executed a legal mortgage to the Bank.

There can be no doubt whatever that from the date of the acceptance of his proposal the defendant, Dixon, had an interest in the premises capable of being affected by a mortgage. The plaintiffs did everything that was necessary to secure their charge upon that interest. Their mortgage accurately defines the premises, and the mortgage was duly registered. They were aware of the custom on the estate, and that no lease or agreement for a lease was in existence. If there had been a lease, and if they had not insisted on getting it into their possession, or, having got it, if they had allowed it to get out of their possession, the case would

Ross, J. 1908.

WORKING-MAN'S BENEFIT BUILDING SOCIETY v. DIXON AND ULSTER BANK.

be different. They were aware that the original time specified had been extended, and that the work was going slowly on. They might reasonably believe that Messrs. Stewart & Sons would not have the lease prepared until the house was ready for occupation.

On the 5th May, 1903, they wrote to Messrs. Stewart informing them of their charge, and asking for the lease. At that time the lease was with Messrs. Reeves, but under the control of the lessors. Through a slip of somebody in the office, the letter was not answered. If Messrs. Stewart & Sons had replied to the effect that the lease was ready in the hands of the estate solicitors, and that they would be obliged to hand it to the lessee, then there would have been something to induce the plaintiffs to take action. But, having no answer to their letter, they had no sufficient reason for anticipating any danger to their security. On the 20th January, 1904, the mischief was done: the lease was deposited in the Bank. It would seem to me exceedingly harsh and unjust to hold that the neglect of the plaintiffs during these seven months to get possession of the lease is such gross negligence as to deprive the plaintiffs of a perfectly valid security.

I have nothing to say about the law in addition to what has been said by Mr Justice Barton in his admirable judgment in *Greer* v. *Greer* (1). In so far as the Bank rely on the equitable mortgage it was taken subject to the prior equities. The legal mortgage cannot help them. It was taken after notice of the prior charge, and with the knowledge that the lessee was a trustee for the plaintiffs. This disposes of the whole case. I only wish to add that if the matter came to the weighing of the respective equities, I think the Bank would not come out better than the plaintiffs. The fact that the term ran from the 1st May, 1894, coupled with the fact that receipts for rent were produced covering a period prior to the date of the lease, might have led the legal advisers of the Bank to the discovery of the existence of the earlier mortgage. I accordingly declare that the plaintiffs' charge takes priority over that of the Ulster Bank. The costs of this action must be added to their charge.

D. M. S.

(1) [1907] 1 I. R. 57.

The Ulster Bank appealed to the Court of Appeal.

S. L. Brown, *K.C.*, and *Charles Murphy* (with them *Chambers*, *K.C.*), for the appellants.

Serjeant O'Connor, *K.C.*, *Powell*, *K.C.*, and *Timothy Sullivan*, for the plaintiffs (respondents).

THE COURT OF APPEAL (The Lord Chancellor, and Fitz Gibbon and Holmes, L.JJ.) affirmed the decision of Ross, J., and dismissed the appeal.

Solicitor for the plaintiffs: *Michael S. Bergin.*

Solicitor for the defendants, the Ulster Bank: *Robert H. Beauchamp.*

W. G.

INDEX.

ABATEMENT OF LEGACIES — *Specific and demonstrative.*] In the event of assets not specifically bequeathed being insufficient to pay debts, specific and demonstrative legacies abate rateably. A testator made specific devises and bequests, and gave pecuniary legacies, and directed that they should be paid out of specific railway stock held by him. His assets not specifically bequeathed were insufficient to pay his debts:—*Held*, that the assets specifically devised and bequeathed, and the specific stock devoted to payment of the pecuniary legacies, were equally liable to contribute to payment of debts, and that the respective devisees and legatees should abate rateably. *In re Turner, deceased*; *Armstrong* v *Gamble* - - - - - - M. R. 274

ABSOLUTE GIFT — *Will — Construction — Restrictions as to mode of enjoyment — Legacy to daughter and gift over, in event of daughter dying unmarried, to surviving brothers and sisters — Unmarried daughter survivor.*] A testator bequeathed to each of his daughters, *A*, *B*, and *C*, £1000 to be paid at their mother's death, provided they should have been previously married with the consent of his executors, and directed that if a daughter should not have been previously married, or if married, had been married without such consent, she was only to receive the income of the £1000 during her life, or until marriage with the consent of his surviving executor, and that if she married without such consent, and died leaving issue, the £1000 was to be divided between her children equally, and in case any daughter should die without being married with such consent and without leaving issue, the principal left to the daughter so dying should go to her surviving brothers and sisters equally. *B* survived her brothers and sisters and died unmarried:—*Held*, that there was an absolute gift to each daughter in the first instance, coupled with restrictions on the enjoyment of it in certain events which did not happen; and that the event which happened, namely, the survivorship of *B* without having been married, not being subject to any restrictions, *B* was absolutely entitled at her death to the legacy. *Lassence* v.

ABSOLUTE GIFT—*continued.*

Tierney (1 Mac. & G. 551), *Hancock* v. *Watson* ([1902] A. C. 14), and *Olphert* v. *Olphert* ([1903] 1 Ir. R. 326), discussed. *FitzGibbon* v. *M'Neill* [M.R. 1

ABSTRACT OF TITLE—Condition as to immediate delivery - - - - 213
See CONDITIONS OF SALE.

ACCOMMODATION WORKS—*Lands Clauses Acts — Enforcement of award as to — Railways (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 70), *s.* 21.] The award of an arbitrator, under the Railways (Ireland) Act, 1851, directing accommodation works to be executed by a Railway Company, cannot be enforced by summary petition under section 21 of the Act. *In re Fishguard and Rosslare Railways*; *Ex parte Kilkenny County Council* [KENNY, J. (for M.R.), 321

ACKNOWLEDGMENT — Mortgage — Statute of Limitations - - - - - 38
See LIMITATIONS, STATUTE OF. 2.

ADMINISTRATION ACTION — Charges against Receiver — Tribunal to investigate - - - - - - 511
See RECEIVER JUDGE.

ADVANCE—Tenancy created after the 1st of January, 1901—Former Tenant 18
See FORMER TENANT.

—— Zones - - - - - - - - 270
See LAND LAW (IRELAND) ACTS. 6.

AGRICULTURAL TENANT—Right to remove sand—Reservation of mines and minerals - - - - - 135, 139
See SAND.

ANNUITY — Jointure — Indemnifying lands—Priority - - - - - 402, 411
See JOINTURE.

—— Marriage settlement—Implied trust for wife
See IMPLIED TRUST. [517

—— Perpetual — Purchase by limited owner — Irish Church Act, 1869, *s.* 34, sub-*s.* 8
See GRANT. 1. [237

ANNULMENT—Bankruptcy - - 297, 303
See BANKRUPTCY.

APPEAL—House of Lords—Land Law (Ireland) Act, 1896, s. 31, sub-s. 4 - 452
See REDEMPTION.

APPOINTMENT—Revocation - - 387
See REVOCATION OF APPOINTMENT.

APPORTIONMENT — Arrears of rent — Irish Land Act, 1903, s. 24 (8) - 120, 125
See LAND LAW (IRELAND) ACTS. 2.

—— Rent — Redemption — Priority as regards indemnifying lands—59 & 60 Vict. c. 47, s. 33 (4) - - - - - - 452
See REDEMPTION.

ARBITRATION—*Policy of insurance—Condition making arbitration and award a condition precedent to liability on the part of the insurers—Differences—Fraud.*] A policy of insurance against fire contained conditions—(*a*) that fraud on the part of the insured should cause a forfeiture of all benefit under the policy; (*b*) that all differences arising out of the policy should be referred to arbitration, and the obtaining of the award should be a condition precedent to any liability or right of action against the insurers in respect of any claim for any loss or damage, or in respect of any other matter in difference. Insured property having been damaged by fire, a claim was duly sent in, and arbitrators were duly appointed. The award found that the claim was fraudulent, and all benefit under the policy was forfeited. In an action to set aside the award, or, in the alternative, for an account of what was due under the policy, the evidence given at the trial consisted of the policy of insurance, some correspondence prior to the arbitration not referring to any charge of fraud, and the award. Some documents which, in the opinion of the Court of Appeal, indicated a case of fraud, were before the arbitrators, and were admitted, apparently without proof or objection, before Ross, J., and in the Court of Appeal:—*Held*, by Ross, J., that the right of the plaintiff to have the question of fraud decided by the Court was not ousted by the conditions in the policy. *Held*, by the Court of Appeal, that the issue of fraud was a difference arising out of the policy; that the principle of *Scott* v. *Avery* (5 H. L. Cas. 811) is not limited to an ascertainment of pecuniary loss, but makes an award respecting all differences under such a condition a condition precedent to the maintenance of an action; that the plaintiff was therefore bound by the award against him, and could not sue upon the policy. *Gaw* v. *British Law Fire Insurance Co.*
[Ross, J., 245; APP. 252

—— Accommodation works — Enforcement of award—Railways Act, 1851, s. 21 321
See ACCOMMODATION WORKS.

ARREARS OF RENT—Irish Land Act, 1903, s. 24 (8) - - - - 120, 125
See LAND LAW (IRELAND) ACTS. 2.

ARREARS OF RENT—*continued.*

—— Judicial tenants—Sale within zones—Jurisdiction of Estates Commissioners [161, 172
See LAND LAW (IRELAND) ACTS. 4.

AWARD.
See ARBITRATION.

BANKRUPTCY—*Will—Construction—Contingent remainder*—Spes successionis—*Bare possibility—Possibility coupled with an interest.*] A testatrix, in 1889, devised certain real estate to trustees, upon the following trusts—(1) to pay the rents and profits thereof to her brother, the then Marquess of *D.*, during his life, should he not at the time of her death be, or subsequently thereto become, a bankrupt; and, upon the failure or determination of such trust, (2) to pay the said rents and profits to her brother, Lord *F. C.*, during his life, subject to a like proviso in case of bankruptcy; and, upon the failure or determination of such last-mentioned trust, (3) to pay the said rents and profits to Lord *S. C.*, during his life; and from and after his death to hold the said real estate "upon trust for the person who shall at the decease of the said Lord *S. C.* be Marquess of *D.*, if he shall not then be, or subsequently become, bankrupt, or have done or suffered anything whereby the said rents and profits, or any part thereof, would, through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, have become vested in or payable to some other person or persons, and his heirs in tail general, according to their respective seniorities." And the testatrix directed that upon the failure or determination of the last-mentioned trust, her trustees should stand possessed of the said real estate, upon trust for the first and every other son of the said Lord *S. C.*, successively, according to their seniorities in tail male, with remainders over. The testatrix died on the 6th March, 1890, prior to which date the Marquess of *D.*, mentioned in the said will, had been several times adjudicated a bankrupt, the last of such adjudications having been made by an order of the English Court of Bankruptcy, dated the 1st November, 1889. The said Marquess of *D.* obtained his discharge under the bankruptcy of 1889 on the 9th July, 1896, and, by an order of the 16th July, 1900, all his other bankruptcies then outstanding were annulled. At the date of the death of the testatrix in 1890 Lord *F. C.* was also an undischarged bankrupt, and Lord *S. C.* (father of the vendor in this matter) thereupon entered into possession of the real estate devised by the will of the testatrix, and continued in possession until his death, on the 6th March, 1901. On the death of Lord *S. C.* the Marquess of *D.* made no claim to the estate, and the vendor thereupon entered into possession of the lands, and subsequently entered into agree-

BANKRUPTCY—*continued.*
ments with the tenants for the sale to them of the lands under the Irish Land Act, 1903. The Marquess of *D.* died in 1904, leaving an infant son, the present Marquess of *D.*, who was born in 1903, his heir-at-law. On a question of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner, as to the power of the vendor to sell the estate:—*Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that the late Marquess of *D.* took nothing under the will while a bankrupt, and his "bare possibility" of becoming "*sui juris*," and of surviving Lord *S. C.*, was not a "possibility coupled with an interest" which could pass by bankruptcy; that on the death of Lord *S. C.*, the Marquess of *D.*, having then obtained his discharge from his last and only annulled bankruptcy, became capable of taking the estate tail, and thenceforth answered the description of the "*persona designata*" to take the estate on the death of Lord *S. C.*; that the Marquess of *D.* not having subsequently become bankrupt, the estate passed on his death to his heir in tail, and that, accordingly, the vendor had no power to sell under the Land Purchase Acts. *Beaupré's Trusts* (21 L. R. Ir. 397) discussed. *In re Chichester's Estate* WYLIE, J., 297; APP. 303

—— Sale of holding—Breach of statutory condition—Fair rent - - - 104
See FAIR RENT.

BEQUEST
See LEGACY.

BONA FIDE TENANT—Compulsory purchase—Consent—Waiver - - 423, 434
See EVICTED TENANT.

BONUS—*Incumbered estate—Sale of—Vendor not entitled to receive any part of rents and profits—Tenant for life—Vendor—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48.] The tenant for life under a settlement of a settled estate, being unable to discharge the incumbrances thereon, assigned his life interest to his wife in consideration of her undertaking to discharge the incumbrances and to indemnify him against the same. Subsequently the husband and wife, as vendors, sold the estate under the Irish Land Act, 1903:—*Held*, by the Court of Appeal, reversing the decision of Wylie, J. ([1907] 1 I. R. 483), that the estate came within the definition in the proviso in sect. 48, sub-sect. 1, of the Act of 1903, and that the bonus should be added to the purchase-money. *In re Roberts' Estate* - - - - APP. 222

2. —— *Vendor tenant for life—Death of, prior to completion of sale—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3.] Where a tenant for life, who had entered into agreements for sale to the occupying tenants under the provisions of the Irish Land Act, 1903, died before the Estates Commissioners had declared the lands comprised in the originating application fit to be regarded as a separate estate for the purposes of the said Act, and the proceedings for sale were continued in the name of the successor in title:—*Held*, that the bonus was payable to the personal representative of the deceased tenant for life. *In re Powell's Estate* [WYLIE, J., 15

—— Assignment of life estate—"Landlord"—Sale to tenants - - - - 293
See LAND LAW (IRELAND) ACTS. 5.

BREACH OF STATUTORY CONDITION—Sale of holding in bankruptcy - 104
See FAIR RENT.

BUILDING CONTRACT—Mistake—Rectification - - - - - 503
See RECTIFICATION OF CONTRACT.

BUILDING LEASE—Contract for—Undefined works—Damages - - - 232
See SPECIFIC PERFORMANCE.

—— Equitable mortgage—Alleged negligence 582, [587
See EQUITABLE MORTGAGE.

CASES—*Beaupré's Trusts* (21 L. R. Ir. 397), discussed - - - - 297, 303
See BANKRUPTCY.

—— *Hancock* v. *Watson* ([1902] A. C. 14) discussed - - - - - - 1
See ABSOLUTE GIFT.

—— *Hext* v. *Gill* (L. R. 7 Ch. App. 699) considered - - - - 135, 139
See SAND.

—— *Hilliard* v. *Moriarty* ([1894] 1 I. R. 316) distinguished - - - - 473
See COSTS.

—— *Lacy, In re* ([1899] 2 Ch. 149) followed 327
See LIMITATIONS, STATUTE OF. 3.

—— *Lassence* v. *Tierney* (1 MacN. & G., 551) discussed - - - - - - 1
See ABSOLUTE GIFT.

—— *Olphert* v. *Olphert* ([1903] 1 I. R. 326) discussed - - - - - - 1
See ABSOLUTE GIFT.

—— *Routledge (George) & Sons, In re* ([1904] 2 Ch. 475) distinguished - - - 279
See DEBENTURES.

—— *Rowe's Estate, In re* ([1907] 1 I. R. 388) followed and explained - 402, 411
See JOINTURE.

—— *Russian Petroleum and Liquid Fuel Co., In re* ([1907] 2 Ch. 540) distinguished 279
See DEBENTURES.

—— *Scott* v. *Avery* (5 H. L. Cas. 811) applied [245, 252
See ARBITRATION.

—— —— v. *Brownrigg* (9 L. R. Ir. 246) distinguished - - - - 228
See CHARITY.

CASES—*continued.*
—— *Scottish Union and National Companies Estate, In re* ([1906] 1 I. R. 42) observed on [161, 172
See LAND LAW (IRELAND) ACTS. 4.
—— *Tasker & Sons, In re* ([1905] 1 Ch. 283) distinguished - - - - - 279
See DEBENTURES.
—— *Upperton* v. *Nickolson* (L. R. 6 Ch.App. 436) followed - - - - - - 213
See CONDITIONS OF SALE.
—— *Wolverhampton Corporation* v. *Emmons* ([1901] 1 K. B. 515) discussed 232
See SPECIFIC PERFORMANCE.
CERTIFIED COPY—License—Indorsement
See PUBLIC-HOUSE. [350
CHARITY—*Gift to—Will—Charitable purposes—Foreign missions—Validity of gift.*] A testator by his will, after making certain devises and bequests, including a bequest of £100 to the parish priest and curate of *K.* for Masses for the repose of his soul, disposed of certain stocks, shares, and moneys, upon trust for his three sisters during their lives; and after the death of the survivor of them he directed that the trust funds should be "expended by his executors in such charities in Ireland, and in such foreign missions, as his executors, in their absolute discretion, should think fit":—*Held*, that the direction that the fund should be expended in charities in Ireland and in foreign missions constituted a valid charitable bequest. *Scott* v. *Browrigg* (9 L.R. Ir. 246) distinguished. *Dunn* v. *Duignan.* BARTON, J., 228
COMPANY—Debentures—Re-issue—Priority
See DEBENTURES. [279
—— Winding up—Sale of mortgaged premises
See COSTS. [473
COMPENSATION — Damages adequate for breach of contract - - - 232
See SPECIFIC PERFORMANCE.
COMPOUND SETTLEMENT — *Vendor and purchaser—Settled Land Acts*, 1882–1890—*Settlement—Life estate—Power of jointuring—Disentailing deed — Re-settlement — Restoration of original life estate and power of jointuring—Creation of new powers of charging.*] A tenant for life agreed to sell portion of the settled lands, under the Settled Land Act. The lands were originally settled on the vendor for life, with remainder to his first and other sons in tail, by the will of his uncle. The will also contained powers of jointuring and charging the lands with portions for younger children. The vendor joined with his eldest son in a disentailing deed, and conveyed the lands to trustees, to such uses as the vendor and his eldest son should jointly appoint; and in default of and until such appointment, upon the pre-existing trusts of the will, and so as to restore the same uses and powers. The trustees of this deed
COMPOUND SETTLEMENT—*continued.*
were appointed trustees for the purposes of the Settled Land Acts. Some time afterwards the vendor joined with his eldest son in a deed, whereby he released the power of charging portions under the will, and in lieu thereof he and his eldest son, under the power of appointment in the disentailing deed, appointed the settled lands to trustees for a term, for the purpose of raising new charges for younger children. Subsequently by a deed of appointment, in exercise of the power given them in the disentailing deed, the vendor and his eldest son settled the lands upon the vendor for life, with remainder over. The life estate was expressed to be in restoration of the vendor's former life estate under his uncle's will, and the power of jointuring thereunder was restored. The deed conferred certain powers of jointuring by future tenants for life, and of charging the lands with portions for younger children, and with payment of certain sums for purposes therein specified. The trustees of the deed were appointed trustees for the purposes of the Settled Land Acts. In exercise of the power under the will and resettlement the vendor duly executed by deed his power of jointuring on the occasion of his subsequent marriage. The purchaser required trustees of a compound settlement, consisting of all the above-mentioned documents, to be appointed. The vendor refused to do so, but offered to appoint trustees, for the purposes of the Settled Land Acts, of the will only:—*Held*, by Barton, J., that trustees of the will only should be appointed. *Held*, by the Court of Appeal (reversing the decision of Barton, J.), that the will and subsequent instruments constituted a compound settlement, under which the lands stood limited by way of succession at the date of the contract for sale, and that the purchasers were entitled to require the appointment of trustees of such compound settlement for the purposes of the Settled Land Acts. *In re Domvile & Callwell's Contract*
[BARTON, J., 475; APP. 488
COMPULSORY WINDING UP — Sale of mortgaged premises—Costs - 473
See COSTS.
CONDITION—Estates Commissioners—Offer to purchase - - - - 211, 119
See LAND LAW (IRELAND) ACTS. 3.
—— Policy of insurance—Arbitration and award
See ARBITRATION. [245, 252
—— Statutory—Breach of—Sale in bankruptcy—Fair rent - - - - - 104
See FAIR RENT.
CONDITIONS OF SALE—*Time for delivery of abstract and requisitions — "Immediately" — Meaning of.*] Premises held under a judicial tenancy were sold subject to conditions of sale, which provided (1) that the vendor should, im-

CONDITIONS OF SALE—*continued.*
mediately after the sale, furnish to the purchaser or his solicitor an abstract of title, and (2) that the purchaser should make his objections and requisitions in respect of the title, and send the same to the office of the vendor's solicitor within four days from the delivery of the abstract, and in this respect time should be of the essence of the contract. The sale took place on the 30th December, 1907; the abstract was delivered on 4th January, 1908, and purchaser's requisitions were sent on 13th January, 1908. The vendor's solicitor declined to answer the requisitions, on the ground that they were late:—*Held*, that the abstract was not delivered "immediately," and consequently not within the time specified in the conditions, and that therefore the purchaser was not bound by the condition requiring the requisitions to be furnished within four days from the delivery of the abstract. *Upperton* v. *Nickolson* (L. R. 6 Ch. 436) followed. *In re Todd and M'Fadden's Contract* - - - KENNY, J. (for M.R.), 213

—— Public-house—Indorsement of certified copy of license - - - - - 350
See PUBLIC-HOUSE.

CONSENT—Evicted Tenants Act, 1907, s. 1, sub-s. 3, - - - - - 423, 434
See EVICTED TENANT.

CONSTRUCTIVE NOTICE—Fraud 261, 333
See FRAUD. 1, 2.

CONTINGENT REMAINDER—Bankruptcy — Will — Construction — Devolution of estate - - - - - - 297, 303
See BANKRUPTCY.

CONTRACT — Specific performance — Damages adequate compensation - - 232
See SPECIFIC PERFORMANCE.

CONVEYANCE—Public-house—Tied license
See PUBLIC-HOUSE. [350

COPY—Certified—Indorsement - - 350
See PUBLIC-HOUSE.

COSTS — *Company — Compulsory winding up—Sale of mortgaged premises by liquidator with consent of mortgagee—Proceeds insufficient to pay mortgage debt—Liquidator's costs.*] In the course of a compulsory winding up, the liquidator sold mortgaged premises with the consent of the mortgagee. The proceeds were insufficient to pay the mortgage in full;—*Held*, that the liquidator was entitled to retain out of the proceeds the costs of realization. *Hilliard* v. *Moriarty* ([1894] 1 I. R. 316) distinguished. *In re Northern Milling Co.* [BARTON, J., 473

COUNTY COUNCIL — Debt — Limitation of time for payment - - - 503
See LIMITATIONS, STATUTE OF. 1.

COURT TENANT—Dismissal of petition—Continuance in possession - - 18
See FORMER TENANT.

CRIMINAL LUNATIC — *Maintenance of — Soldiers and sailors sent to District Lunatic Asylum in Ireland as dangerous lunatics — Lunacy (Ireland) Act, 1901, sections 3 (1) and 6.*] Soldiers and sailors confined in District Lunatic Asylums in Ireland, who have been sent there as dangerous lunatics under section 91 (2) of the Army Act, 1881, or section 3 of the Naval Enlistment Act, 1884, come within the definition of "criminal lunatics" in the Lunacy (Ireland) Act, 1901, section 6, and the expenses of their maintenance in District Lunatic Asylums in Ireland are to be defrayed out of moneys provided by Parliament. *Richmond District Asylum Board* v. *The King* [BARTON, J., 21; APP. 31

CROWN—Rights of—Inland non-tidal lake 358
See FISHERY.

CUSTOM OF ESTATE—Building lease—Equitable mortgage—Negligence in not obtaining lease - - - 582, 587
See EQUITABLE MORTGAGE.

DANGEROUS LUNATIC.
See CRIMINAL LUNATIC.

DEATH—Of absolute owner—Pending application for sale of demesne - - 537
See LAND LAW (IRELAND) ACTS. 1.

DEATH UNMARRIED—Gift over to survivors—Will—Construction - 1
See ABSOLUTE GIFT.

DEBENTURES— *Company — Re-issued debentures—Priority—Redemption — Section 15 of the Companies Act, 1907 (7 Edw. 7, c. 50).*] Sect. 15 of the Companies Act, 1907 (1), enables a Company (save as therein excepted) to keep its own debentures alive, for the purpose of re-issue from time to time, as security for advances from the Company's bankers, without disturbing their priority, and displaces the law as laid down upon that subject in *In re Geo. Routledge & Sons, Ltd.* [(1904] 2 Ch. 475), *In re Tasker & Sons, Ltd.* [(1905] 1 Ch. 283), and *In re Russian Petroleum and Liquid Fuel Co., Ltd.* [(1907) 2 Ch. 540). The section is retrospective, and operates upon past as well as future transactions, and it preserves the priority of such debentures as of the original date of issue, and not merely as of the date of re-issue. A Company, before the passing of the Companies Act, 1907, deposited from time to time some of its first debentures with its bankers, as security for an overdraft. The practice was to transfer the debentures from nominees of the Company to trustees for the Bank, and, upon repayment of the overdraft, to re-transfer the debentures to nominees of the Company:—*Held*, that the retrospective provisions of section 15 of the Companies Act, 1907, had the effect of preserving the original priority of these debentures. A Company, in 1901, invited subscriptions for an issue of second debentures by a prospectus which contained a statement that the

DEBENTURES—*continued.*
issue was made for the purpose, *inter alia*, of repaying a temporary loan from the Company's bankers. It was expressly stated in the prospectus, in the conditions on the second debentures, and in the trust deed, that the second debentures were to be puisne and subject to the whole of the first debenture issue. The loan from the Bank was repaid out of the proceeds of the second debenture issue; and some first debentures, which had been deposited with the Bank, and transferred to trustees for the Bank as security for the loan, were afterwards re-transferred from trustees for the Bank to nominees of the Company:—*Held*, that these first debentures were not redeemed "in pursuance of any obligation so to do" within the meaning of one of the exceptions contained in section 15 of the Companies Act of 1907, and that the priority of these first debentures, as such, was not disturbed. Section 15 of the Companies Act, 1907, considered and discussed. *Fitzgerald* v. *Persse*
[Barton, J., 279

DECEPTION—Label - - 43, 73, 466
See Label.

DECLARATION — Separate estate — Provisional - - - - - 161, 172
See Land Law (Ireland) Acts. 4.

DEMESNE—Application for sale with a view to re-purchase—Death of absolute owner
See Land Law (Ireland) Acts. 1. [537

DISTRICT LUNATIC ASYLUM — Soldiers and sailors—Expense of maintenance
See Criminal Lunatic. [21, 31

EQUITABLE MORTGAGE — *Priorities — Negligence in allowing mortgagor to obtain possession of title-deed—Notice — Building lease — Custom of estate to withhold execution of lease till after completion of buildings.*] In 1894 the defendant *D.* made a proposal to the lessors, to take certain lands on a building lease. The proposal having been accepted by the lessors, *D.* went into possession of the land, but there was no document accepting the proposal, the custom on the estate being to execute the leases only after the buildings were erected. In 1900 a mortgage of the premises was executed by *D.* to the plaintiffs, to secure a loan; and the mortgage was registered on the 14th September, 1900. On the 14th July, 1902, the lessors executed to *D.* a lease for 150 years, from the 1st May, 1894; and, on the 7th May, 1903, *D.* obtained possession of the lease from the lessors' solicitors. On the 5th May, 1903, the plaintiffs wrote to the lessors' agents, informing them of their equitable mortgage, and asking that the lease, when executed, should be sent to them; but they received no answer to this letter, and were not informed of the lease being executed and handed to *D.* On the 20th January, 1904, *D.* deposited the lease with the defendants, the Bank, to secure a

EQUITABLE MORTGAGE—*continued.*
loan, producing to the Bank at the same time a receipt for rent as from 1897. The Bank made no inquiry, and searched only from January, 1902. In 1906 the Bank, after they had received express notice of the plaintiff's equitable mortgage, took a legal mortgage of the premises from *D.* The premises having been sold, and the proceeds being insufficient to pay both the plaintiffs and the Bank in full:—*Held*, by Ross, J., that the plaintiffs' neglect to get possession of the lease was not such gross negligence as to deprive them of their priority. *Held*, further, that the Bank were not in any better position by reason of their legal mortgage, they having taken it after receiving notice of the prior equitable charge, and with the knowledge that their mortgagor was a trustee for the plaintiffs. Decision of Ross, J., affirmed by the Court of Appeal. *Workingman's Benefit Building Society* v. *Dixon and The Ulster Bank, Limited* - - - Ross, J., 582; App. 587

—— Fraud—Notice - - - 261, 333
See Fraud. 1, 2.

ESTATE—Devolution—*Spes successionis* — Possibility coupled with interest 297, 303
See Bankruptcy.

—— For life — Resettlement — Restoration of former estate and power—Settled Land Acts - - - - - 475, 488
See Compound Settlement.

—— For life—Will—Construction - - 288
See Estate for Life.

ESTATE FOR LIFE—*Will—Construction of—To be held by her for her own use, and for the use of children—Life estate with remainder, or joint tenancy.*] A testator, by his will, left his property to his wife, "to be held by her for her own use, and for the use of any children which have sprung or may spring from our marriage. She has a right to divide the above possessions among her offspring which may be descendants of mine":—*Held*, that the wife took an estate for life, with a power of appointment among children and remoter descendants. *Bradshaw* v. *Bradshaw*
[Barton, J., 288

—— Compound settlement - - 475, 488
See Compound Settlement.

ESTATES COMMISSIONERS — Jurisdiction—Price—Zone limits - 111, 119
See Land Law (Ireland) Acts. 3.

—— Jurisdiction—Sale of demesne with a view to repurchase—Death of absolute owner 537
See Land Law (Ireland) Acts. 1.

—— Jurisdiction—Separate estate—Declaration—Agreement as to price — Sale within zones—Arrears of rent - 161, 172
See Land Law (Ireland) Acts. 4.

ESTATES COMMISSIONERS—*continued.*
—— Restoration of evicted tenant—Act of 1907, sect. 1, sub-sect. 3 - - 423, 434
See EVICTED TENANT.

EVICTED TENANT—*Compulsory acquisition of land*—Bona fide *tenant*—*Consent of tenant to acquisition of his tenancy*—*Waiver of prohibition.*] *C.*, a tenant in occupation of a holding formerly held by a tenant who had been evicted, presented a request to the Estates Commissioners, asking them to acquire from his landlord the lands of which he was then tenant, and agreeing to sign any document which might be necessary for the transfer of the tenant's interest to the Estates Commissioners. *C.* was a *bona fide* tenant, cultivating his land as an ordinary farmer, in accordance with proper methods of husbandry, within the proviso in sub-section 3 of section 1 of the Evicted Tenants (Ireland) Act, 1907. On the hearing of a memorandum, submitting questions of law for the decision of the Judicial Commissioner:—*Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that the prohibition against the compulsory acquisition of land by the Estates Commissioners, contained in sub-section 3 of section 2 of the Act, could not be waived by the consent of the tenant alone, and that the Estates Commissioners were debarred from acquiring the land comprised in *C.*'s holding under the provisions of the Evicted Tenants (Ireland) Act, 1907. *In re Clanricarde's (Marquess of) Estate* [WYLIE, J., 423; APP. 434

EVIDENCE — Extrinsic — Will — Nieces and nephews - - - - - 155
See UNCERTAINTY.
—— Memorial of Landed Estates Court Conveyance - - - - 135, 139
See MEMORIAL.
—— User—Fishery - - - - 358
See FISHERY.

EXECUTOR — Residue — Acknowledgment to wrong party—Statute of Limitations 327
See LIMITATIONS, STATUTE OF. 3.

EXPRESS TRUST — Executor — Residue—Intestacy—Next-of-kin - - 327
See LIMITATIONS, STATUTE OF. 3.

EXTRINSIC EVIDENCE—Will—Uncertainty
See UNCERTAINTY. [155

FAIR RENT—*Landlord and Tenant—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 20—*Sale of present tenancy in consequence of a breach of a statutory condition—Bankruptcy of tenant—Sale in bankruptcy—Right of purchaser to apply to fix a fair rent for the second term.*] *S.*, a tenant of a farm in the county of Armagh, had a fair rent fixed for the first term in July, 1891. On the 17th September, 1895, *S.* was adjudicated bankrupt on his own petition. *K.* purchased the farm in the bankruptcy of *S.*, and the sale was confirmed by the Court. In 1906 *K.* applied to fix a fair rent for a second term:—*Held* (affirming the decision of Fitz Gerald, J.), that this was not a sale of a present tenancy, in consequence of a breach of a statutory condition within the meaning of section 20 of the Land Law (Ireland) Act, 1881, and that the tenant was entitled to have a fair rent fixed for the second term (2). *Knipe* v. *Riddall* APP. 104

FEE-FARM GRANT — Reservation of mines and minerals—Sand—Agricultural holding - - - - - 135, 139
See SAND.

FEE-SIMPLE—Purchase of, by tenant for life—Registration—Graft - - 190, 201
See GRAFT. 2.

FINES — Renewable lease — Sale under Land Acts—Priority - - - - 467
See RENEWABLE LEASE.

FISHERY—*Several fishery—Navigable non-tidal lake—Public user—Prescription—Evidence—Injunction—Practice.*] The Crown is not, of common right, entitled to the soil or waters of an inland non-tidal lake. No right can exist in the public to fish in the waters of such a lake. A claim was made for a several eel fishery, extending over the whole of Lough Neagh, a large, navigable, non-tidal lake in Ireland. The claim was founded on a grant by Charles 2, dated 1661, and upon certain leases since made by persons claiming under the grant, and payments of rent under grant and leases were shown. The title of the Crown was established to the satisfaction of the Court by certain inquisitions had prior to the grant. As evidence of user under the grant it was proved that the Bann eel fisheries, which were held by the same title as the lough fisheries, were strictly preserved. There was no evidence of acts of ownership in respect of the eel fishing in the lough, but the grantees exercised their rights over river and lough by means of weirs in the river, which was the ancient and recognized method of eel fishing. The evidence showed that only in a small portion of the lough had the fishing been protected and convictions for trespass been obtained. On behalf of the defendants, who were fishermen, evidence was given of continuous fishing by the public from time immemorial:—*Held*, that, the plaintiffs' paper-title to a several fishery in the whole of the lough being irresistible, and their user under their title being the only reasonable and profitable user, the plaintiffs' title was not displaced by the evidence of long-continued user on the part of the public. There was no evidence of any damage having been done to the plaintiffs' several fishery, save by the defendants fishing with draft-nets in Toome Bay, a small portion of Lough Neagh, situate at the north-western corner, where the waters of the lough discharge themselves in the Lower Bann River:—

FISHERY—*continued.*
Held, that the injunction against the defendants should be restricted to Toome Bay, with liberty to the plaintiffs to apply in respect of any further injury to their several fishery. *O'Neill* v. *Johnston* - - - - - Ross, J., 358 [APP.]
FOREIGN MISSIONS—Bequest for - 228
See CHARITY.
FORMER TENANT — *Land Purchase Acts — Tenant, pending the matter, remaining in possession after dismissal of petition—Tenancy when created—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 53 (1).] Where an agreement for the sale of a holding under the Land Purchase Acts had been entered into, and it appeared that the estate of which the holding formed a part had been subject to an absolute order for sale which had been dismissed in 1902, and that the tenant, who, since 1900 had been a tenant pending the matter in the Land Judge's Court, had, on the dismissal of the petition, remained on in possession of the holding paying the same rent: on a question arising as to the amount of the advance that could be made:—*Held* (1) that the tenancy was one created after the 1st January, 1901; but (2) that the tenant was a former tenant, within the meaning of the proviso to sect. 53 (1) of the Irish Land Act, 1903. *In re Ruttledge's Estate* - - - - - WYLIE, J., 18
FRAUD — *Mortgage—Constructive notice—Independent solicitor—Purchase for value.*] *A.*, who, from his boyhood, was a person of dull intelligence, indolent habits, and, in manhood, led a secluded and inexpensive life (but as to whom the Court held that, during the period when the impeached transactions took place, there was no evidence showing him to be an idiot, or incapable of executing deeds), came into possession, in 1880, of an unincumbered estate, yielding a profit rent of about £630. *F.*, who had been agent to *A.*'s father, was continued in that capacity by *A.* In the year 1884 the property was subject to admittedly valid mortgages for £3000 and £781. By indenture of the 17th April, 1884, *A.* mortgaged all his property to *F.* to secure advances to be made by *F.* as his land agent or manager up to £1000. By deed of conveyance, dated 22nd September, 1892, reciting the preceding mortgages, and that £1000 was due to *F.* on his mortgage, besides £653 alleged to be due on foot of accounts stated and settled between *A.* and *F.*, *A.*, in consideration of the release by *F.* of all his claims, in pursuance of a recited agreement to that effect, conveyed all his property to *F.*, and in further consideration of an annuity of £200 for his life, charged on the property, and the use for his life of the dwellinghouse on part of it, which *F.* covenanted to keep in repair; but the deed contained a proviso that the mortgage of the 17th April, 1884, was to remain existing. *A.* afterwards became surety for *F.* on bills and
FRAUD—*continued.*
notes to the N. Bank, constituting about one-sixth of *F.*'s indebtedness to the Bank. *F.*, representing that the Bank was pressing for payment, induced *A.* to agree to postpone his rentcharge to his own liability to the Bank. But by deed of mortgage to the Bank, dated 21st August, 1896, reciting the previous mortgages, and that *F.*'s mortgage of the 17th April, 1884, was subsisting, and £1000 due thereon, *A.* being made a party to the deed, *F.* assigned to the Bank his mortgage for the full sum of £1000, and *A.* and *F.* mortgaged all the property to the Bank by demise for the purpose of postponing all *A.*'s rights and claims, not merely to his own liability as *F.*'s surety, but to all *F.*'s liabilities on his account with the Bank, for which the mortgage was, at the Bank's pleasure, to be a continuing security. *A.* had the benefit, in connexion with the transaction of 1892, of the advice of an eminent firm of Dublin solicitors, who, however, did not apparently fathom *F.*'s capacity for fraud, or *A.*'s ineptitude to resist it:—*Held*, by the Court of Appeal, affirming the judgment of Ross, J., that the deeds of 1892 and 1896 were fraudulent, and should be set aside; and that the Bank were not purchasers without notice:—*Held*, varying the judgment of Ross, J., that the mortgage of the 17th April, 1884, should stand to the extent of any advances *bona fide* made. *Aldritt* v. *Maconchy* - - APP. 333
2.——*Purchase for valuable consideration without notice—Constructive notice—Fraud—Principal and agent—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 30.] *B.*, a widow of intemperate habits, under the influence and control of *K.*, a widower, with whom she for some time lived, was, by fraud and undue pressure, induced by *K.* to deliver to *K.* certain scrip, to be lodged by *K.* with the defendant Bank as security for a loan by the Bank to *K.* The Bank manager, beyond being informed that *B.* was staying at *K.*'s house, knew nothing about the relations existing between *B.* and *K.*, and made no inquiry, and never saw *B.*, but employed *K.* to obtain *B.*'s signature to the blank transfers of the scrip and to promissory notes, signed by her as collateral security for the loan. *B.* afterwards became of unsound mind. In an action by *B.*, by the committee of her estate, against the Bank, asking for a declaration that the deposit of the scrip created no equitable mortgage, that the blank transfers were invalid, and that the plaintiff's estate was not liable on foot of the promissory notes:—*Held*, that the plaintiff was entitled to the declaration sought, on the grounds—(1) that the Bank were, by the circumstances of the transaction, put on inquiry, and not having made inquiry, were affected with notice of the invalidity of the transaction, and could not rely on the defence of purchase for value without notice;

FRAUD—*continued.*
(2) that the Bank made *K.* their agent for the purposes of the transaction; and that *K.*'s knowledge must, therefore, be imputed to the Bank, who must stand or fall with *K.* *Bunbury* v. *Hibernian Bank* - - - - Ross, J., 261 [APP.]
—— Question of — Difference arising out of a policy of insurance—Arbitration clause *See* ARBITRATION [245, 252

GRAFT—*Settlement—Lands subject to perpetual annuity—Purchase of annuity by tenant for life—Part payment by mortgage of annuity—Beneficial interest in annuity—Irish Church Act*, 1869 (35 & 36 *Vict. c.* 90), *s.* 34, *sub-s.* 8.] In 1878 the Commissioners of Church Temporalities in Ireland, pursuant to the provisions of sect. 34 of the Irish Church Act, 1869, and in consideration of the sum fixed by the statute as the purchase-price, assigned a perpetual annuity, which had become vested in them by virtue of the Irish Church Act, to the owner of the lands on which the annuity was charged, who was entitled to the said lands as tenant for life. Portion of the purchase-price was paid in cash by the tenant for life, and the balance was secured by mortgage of the annuity to the Commissioners, without imposing any burden on the said lands:—*Held*, that the tenant for life was absolutely entitled to the annuity, subject to the mortgage. *In re De Vesci's Estate* [WYLIE, J., 237

2. —— *Settlement—Lease for life and reversionary term of years—Trust for settlor "or his heirs"—Purchase of fee by limited owner—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 29.] *A.* put in settlement, on the marriage of his son *B.* with *C.*, lands held under a lease for the life of *X.* and a reversionary term of years, and the stock and chattels thereon, upon trust to permit *B.* to receive the profits and benefits thereof during the joint lives of *B.* and *C.*, and in default of issue of the marriage, and in the event of *C.* surviving *B.* (which event happened), to permit her to receive a jointure of £40 a year, and, subject thereto, "for the absolute use of *A.* *or* his heirs." *B.* after the death of *A.* and during the life of *X.*, purchased the fee-simple of the lands under the Purchase of Land (Ireland) Acts, and was registered as owner in fee-simple thereof, under the Local Registration of Title (Ireland) Act, 1891, subject to the equities (if any) arising from the existence of his previous interest in the lands. *X.* died in 1903. *B.* by his will left the lands to *D.* *A.* died in 1872, without having disposed of his interest (if any) in the lands, leaving *B.*, his eldest son and heir-at-law, and other children surviving:—*Held*, (1) that the words "or heirs" were superfluous, or were used by way of substitution to indicate that the lands were to result to the settlor absolutely in the events which happened, and that, having become a chattel interest, they passed to his personal representative on the death of *B.*, subject to the annuity to *C.*; and (2) that the fee-simple acquired by *B.* was subject to the trusts of the settlement, and that on his death the next-of-kin of *A.* became beneficially entitled to the lands for the residue of the term of years, subject to the annuity, and to the stock and chattels thereon. *Burton* v. *Nunan* - - M.R. 190; APP. 201

GRAFT—*continued.*

HEIRS—Chattels limited to—Settlement—Construction - - - - 190, 201
See GRAFT. 2.

HOUSE OF LORDS—Appeal—Competency—Land Law (Ireland) Act, s. 31, sub-s. 4 *See* REDEMPTION. [452

HUSBAND AND WIFE—Jointure—Indemnifying lands—Priority - 402, 411
See JOINTURE.
—— Purchase by husband of reversion on wife's lease - - - - - - 393
See MERGER.
—— Settlement—Annuity—Implied trust for wife *See* IMPLIED TRUST. [517

IMPLIED TRUST—*Settlement—Construction—Marriage portion—Omission of trusts for wife—Estate by implication.*] A father, in pursuance of an agreement to settle a perpetual annuity, charged on land to which he was entitled, upon his daughter and her intended husband as her marriage portion, settled the annuity upon trust after his own death for the husband during the joint lives of husband and wife, and, in the event of the wife predeceasing the husband, and there being children, upon trust for the husband absolutely; and in the same event, if there were no children, upon trust for the husband for life, and after his death upon trust for such member of her own family as the wife should by will appoint, and in default of appointment upon trust for himself absolutely. There was no trust for the wife in the event of her surviving the husband, nor for children. The husband predeceased the wife, leaving children. An originating summons was taken out by the wife, to which the devisees of the settlor and the children were made defendants, to determine to what estate or interest, if any, in the annuity she was entitled:—*Held*, that upon the true construction of the settlement as a whole, the wife, by necessary implication, was, in the events which happened, entitled to a declaration that she was absolute owner of the annuity. *Sweetman* v. *Butler* - M.R. 517

INCUMBRANCES—Assignment by tenant for life to discharge - - - 222
See BONUS. 1.

INDEMNITY—Jointure—Lands sold subject to —Indemnifying lands unsold — Priority *See* JOINTURE. [402, 411

INDEMNITY—*continued.*
—— Rent—Apportionment and redemption—59 & 60 Vict. s. 31 (4), s. 33 (4)—Appeal to House of Lords - - - 452
See REDEMPTION.

INFRINGEMENT—Trade mark—Label
See LABEL. [43, 73, 466

INJUNCTION — Label — Trade mark — Similarity - - - - 43, 73, 466
See LABEL.
—— Mandatory—Obstruction to light 541, 561
See MANDATORY INJUNCTION. [577
—— Several fishery—Trespass - - 358
See FISHERY.

INSURANCE.
See POLICY OF INSURANCE.

INTEREST ON MONEY—Alleged payment—Originating summons - - 38
See LIMITATIONS, STATUTE OF. 2.

INTESTACY—Residue—Express trust - 327
See LIMITATIONS, STATUTE OF. 3.

JOINTURE—*Chancery Division, Land Judge's Court—Land Judge's conveyance — Absolute order for sale of lands — Sale of part of lands—Lands sold subject to jointure rentcharge, but indemnified against same by unsold lands — Incumbrances prior to jointure on unsold lands—Rights of jointress.*] The jointress in *Rowe's Estate* [1907] 1 I. R. 380) brought to trial an action to have her jointure rentcharge declared well charged on the part of the estate conveyed to purchasers by Land Judge's conveyances in 1879-1880, and for the appointment of a receiver:—*Held* (by Kenny, J.), that, although the jointress was entitled to have her jointure declared well charged on the sold lands, and to an account, yet, having regard to the order of the Court of Appeal ([1907] 1 I. R. 388), this declaration should be made without prejudice to such rights as that order declared to exist in favour of unpaid incumbrancers in the matter of *Rowe's Estate*; and the Judge declined for the present to appoint a receiver or to order a sale, reserving leave to the plaintiff to apply for either or both—the unpaid incumbrancers to have notice of any application for a receiver, sale, or allocation. The plaintiff having appealed from the order, save so far as it declared the jointure well charged and directed an account:—*Held*, by the Court of Appeal, that their order of the 27th June, 1907, being based on their opinion that the prior unpaid mortgagees retained their priority against any claim by the jointress directly, or by the purchasers of the sold lands claiming under the indemnity, the appeal could not be allowed consistently with that order, or with the opinions which the majority of the Court of Appeal then expressed, and by which the Court considered that the present plaintiff was bound; and that, as against

JOINTURE—*continued.*
the defendants in the present action (the purchasers of the sold lots), she could not require immediate payment from them, so as either to defeat the indemnity or indirectly throw the jointure on the incumbrancers of the unsold lands. Holmes, L.J., while concurring in the judgment, on the ground that he was bound by the decision in [1907] 1 I. R. 388, stated that the only reason given by him for objecting to the order then made was that he did not understand its effect; but that, if he had understood it as now interpreted by the majority of the Court, he would have dissented from it on the ground that it was made without jurisdiction, or was an improper exercise of jurisdiction, if any such existed. *Rowe* v. *Gough*
[KENNY, J. (for M.R.), 402; APP. 411 [REV.]

JURISDICTION — Estates Commissioners — Death of vendor—Offer to devisees
See LAND LAW (IRELAND) ACTS. 1. [537
—— Estates Commissioners—Price—Zone limits— [111, 119
See LAND LAW (IRELAND) ACTS. 3.
—— Estates Commissioners — Separate estate — Declaration—Zones - - 161, 172
See LAND LAW (IRELAND) Acts. 4.
—— Land Commission—Turbary—Regulations as to Irish Land Act, 1903, sect. 21 202
See TURF.
—— Receiver Judge—Charges against receiver
See RECEIVER JUDGE. [511

LABEL—*Trade mark—Registration—Infringement—Similarity—Injunction—Evidence—Likelihood of deception—Advertisements and circulars—Inspection by Judge.*] The plaintiffs were owners of a registered trade mark, which had the form of a square body-label, printed in gold on a white ground, and which was affixed to every bottle of Cognac brandy exported by them to the United Kingdom, with which they carried on a large and long-established trade. This body-label consisted of a frame of vine-leaves and grapes in the form of a garland, rising out of a double stem, and tied at the base with a ribbon. The frame surrounded a space, in the centre of which was placed the name of plaintiffs' firm and its place of business ("*H. & Co.*, Cognac"), and was surmounted at the top of the central space by a device of a mailed arm and hand grasping a battle-axe rising out of a scroll or heraldic bar. There was also a neck-label, with a star device, attached to the bottles exported by plaintiffs, but this was no part of the registered mark. Plaintiffs brought an action for infringement of trade mark, and to restrain the defendant in respect of the sale of bottles of brandy which were labelled with a label of the same shape as the plaintiffs' registered label, and which were also printed in gold on a white ground, and consisted of a frame of vine-leaves

LABEL—*continued.*
and grapes, enclosing a central space in which appeared the words "Celebrated Old Brandy"; and above, in place of the "arm and battle-axe" device, there was a prolongation of the grape and vine-leaf garland. There was no name of any manufacturer or shipper on the label or bottle, nor was there any neck-label or star device thereon. It appeared that in cautionary advertisements and notices the public were warned not to accept brandy as Hennessy & Co.'s without their name and the device of the battle-axe on the label. Evidence was given that a garland of vine-leaves and grapes printed in gold on a white ground was commonly used by bottlers of brandy. Plaintiffs called no witnesses, either to prove actual deception or that the label of defendant was calculated to deceive. According to the testimony of a number of witnesses examined for the defendant, the impeached label was not calculated to deceive, and could not mislead anyone, as, in their opinion, the essential characteristics of the registered mark were absent from the impeached label. It further appeared from evidence which the Court of Appeal considered reliable that the impeached label had been produced more than twenty-six years ago by a firm of printers which was dissolved in 1898, and had been for that period in constant and well-known use by the trade in Dublin; and that the labels (eleven in number) actually used by the defendant were found by his assistant in a drawer when he took possession in 1897, apparently left by his predecessor:—*Held*, by the Master of the Rolls, (1) that the label of defendant was an infringement of plaintiffs' trade mark, and that, taking the labels as a whole, the label of the defendant so nearly resembled that of the plaintiffs as to be liable to deceive an incautious purchaser. (2) That the calling of evidence to prove actual deception, or that the label was calculated to deceive, in a case of this kind, was unnecessary, as the Court must ultimately decide the question of similarity itself. (3) That as a fact, the impeached label was used, and the arrangement of the bottles in the defendant's shop was made, with the purpose of deceiving an unwary purchaser. *Held*, by the Court of Appeal, that there was no evidence of intention to deceive purchasers; that on inspection the labels were dissimilar in their essential characteristics, especially in those specified by the plaintiffs in their cautionary advertisements and notices; and that, accordingly, the plaintiffs were not entitled to an injunction. The judgment of the Court of Appeal affirmed by the House of Lords. *Hennessy* v. *Keating*
[M.R. 43; APP. 73; H.L. 466

LANDED ESTATES COURT CONVEYANCE—Memorial—Evidence 135, 139
See MEMORIAL.

LAND LAW (IRELAND) ACTS—*Application by absolute owner of land to Land Commission to purchase his demesne with a view to re-purchase—Death of vendor before offer made—Jurisdiction of Estates Commissioners to make offer to his devisees——Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 3.] A vendor, who was absolutely entitled, filed an originating application for the sale of certain tenanted lands, and thereby applied to the Land Commission to purchase his demesne with a view to the re-purchase thereof by him. The vendor died before the advances for the purchase of the tenanted lands (which were subsequently sanctioned) were made, having by his will devised all his real and personal property to his trustees and executors, upon trust for sale, but with power to postpone such sale so long as they might think fit:—*Held*, that the Estates Commissioners had jurisdiction to make an offer to the trustees for the purchase of the demesne, and to sanction an advance for the re-purchase thereof by the trustees. *In re Anderson's Estate*
[WYLIE, J., 537

2. —— "*Arrears of rent . . . due*"—*Meaning of—Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 8.] The words "arrears of rent . . . due" in section 24, subsection 8, of the Irish Land Act, 1903, mean rent which accrued due up to the gale-day immediately preceding the date of the agreement for sale, and do not include the apportioned part of the gale of rent which accrued between the said gale-day and the date of the said agreements. *In re Earl of Bandon's Estate* (*No.* 2). WYLIE, 120; APP. 125

3. —— *Estimating price of estate*—"*Have regard to*" *prices at which tenants have undertaken to purchase where within zone limits—Conditional offer to purchase—Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *section* 6.] Where, in proceedings for the sale of an estate under the provisions of section 6 of the Irish Land Act, 1903, an originating request had been lodged, together with undertakings by the tenants to purchase at prices which were within the zone limits:—*Held*, that the Estates Commissioners, in estimating the price to be offered for the estate, while bound to have regard to the prices mentioned in the undertakings as evidence of what the tenants were willing to agree to give, were not necessarily bound to adopt them. *In re Gun's Estate*
[WYLIE, J., 111; APP. 119

4. —— *Price—Sale within zones—Separate estate — Declaration — Jurisdiction of Estates Commissioners — Arrears of rent—Irish Land Law Act*, 1903 (3 *Edw.* 7 *c.* 37), *s.* 98.] An originating application for the sale of an estate comprising sixty holdings, fifty-six of which were subject to judicial rents, was lodged on the 20th December, 1904, and filed on the 3rd March, 1905. In the

LAND LAW (IRELAND) ACTS—*continued.*

case of each judicial tenant the purchase-money was within the zones. On the 1st June, 1905, the following Provisional Declaration was made by the Estates Commissioners: "Subject to the result of such further inquiries as may be made, the lands . . . may be regarded as an estate." On the 1st February, 1907, the Estates Commissioners required a statement showing the rent paid by each of the tenants during the five years prior to the sale. This was refused in the cases of the judicial tenancies, on the ground that the Commissioners had no power to investigate the security. The Commissioners insisted on an answer to their requisition; and the following questions of law were accordingly submitted to the Judicial Commissioner:—Had the Estates Commissioners jurisdiction—(1) to require, in the case of the judicial tenants, a statement showing the rents paid by each during the previous five years; (2) to consider at all applications for advances before a declaration under section 98 (1) of the Irish Land Act, 1903, had been made; (3) to take any definite step with regard to the sale before making that declaration; (4) to issue the Provisional Certificate? and whether they had power to postpone the exercise of their discretion as to issuing a final declaration or certificate under section 98 (1) until the day upon which the holdings were to be vested in the purchasers? *Held*, by Wylie, J., that the Provisional Declaration was not such a declaration as was contemplated by section 98 (1), and was merely an indication to the vendor at an early stage that such a declaration would probably be made. Taking this view of the Provisional Declaration, and following the decision of Meredith, M. R., in *In re Scottish Union and National Companies Estate* ([1906] 1 I.R. 42), Wylie, J., answered (1) in the affirmative. As to (4), where all due inquiries have been made and everything arranged to enable a sale to be carried out, there is nothing to prevent steps, dependent on the declaration, being taken on the same day in their proper order. Wylie, J., held that (2) and (3) did not arise on the facts stated in the memorandum on which the questions were based:—*Held*, by the Court of Appeal, it being admitted that the requisition referred to in (1) was for the purpose of considering whether the judicial holdings were sufficient security for the advances applied for, that the following answers should be given: (1) and (4) in the negative; (2) in the affirmative, save so far as the consideration of the application for advances was for the purpose of ascertaining whether the judicial holdings were sufficient or adequate security for the advances applied for; and (3) in the negative, save so far as regards any definite step which the Estates Commissioners may consider it material and necessary to take with a view to

LAND LAW (IRELAND) ACTS—*continued.*

making the declaration. *In re Weir's Estate* [WYLIE, J., 161; APP. 172

5. —— *Sale to tenants direct—Tenant for life who has assigned his life estate—"Landlord"—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 34.] A tenant for life who has assigned his life estate is a "landlord" for the purpose of a sale direct to his tenants under the Land Purchase Acts. *In re Ker's Estate* - - WYLIE, J., 293

6.——*Zone cases—Limitations on advances—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 1, *sub-s.* 4—*Purchase of Land Amendment Act* (51 & 52 *Vict. c.* 49), *s.* 2.] In cases coming within the provisions of sect. 1, sub-sect. 1, of the Irish Land Act, 1903, the Estates Commissioners, while bound to make advances applied for by a purchasing tenant up to £3000, including in that £3000 any sums already advanced to the same tenant for his own benefit, and not as trustee, are not bound to make advances applied for in excess of that amount, unless they consider it expedient to make larger advances within the prescribed limits for the purposes mentioned in section 2 of the Purchase of Land Amendment Act, 1888, or sect. 1, sub-sect. 4, of the Irish Land Act, 1903. *In re Malone's Estate* - - - - - WYLIE, J., 270

—— Advance—Tenancy created after 1st January, 1901—Former tenant - - 18
See FORMER TENANT.

—— Bonus—Assignment of life estate—Undertaking by assignee to discharge incumbrances—Tenant for life not entitled to receive rents or profits - - 222
See BONUS. 1.

—— Bonus—Death of vendor (tenant for life) before completion - - - 15
See BONUS. 2.

—— Breach of statutory condition—Sale of holding on bankruptcy of tenant—Fair rent - - - - - - 104
See FAIR RENT.

—— Evicted tenants—Replacement of—7 Edw. 7, c. 56 - - - - 423, 434
See EVICTED TENANT.

—— House of Lords—Appeal to—59 & 60 Vict. c. 47, s. 31 (4) - - - 452
See REDEMPTION.

—— Redemption—Indemnifying lands—Priority—59 & 60 Vict. c. 47, s. 33 (4) 452
See REDEMPTION.

—— Regulations as to turbary—Jurisdiction Land Commission - - - - 202
See TURF.

—— Renewable lease—Fines—Priority - 467
See RENEWABLE LEASE.

LANDLORD AND TENANT—Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

LANDLORD AND TENANT—*continued.*
—— Restoration of evicted tenant — Consent — Evicted Tenants Act, 1907, s. 1, sub-s. 3
See EVICTED TENANT. [423, 434
—— Right of agricultural tenant to remove sand—Reservation of mines and minerals
See SAND. [135, 139
—— Tenancy when created—Court tenant—Dismissal of petition - - - 18
See FORMER TENANT.
—— Turbary — Regulations as to — Land Commission—Jurisdiction - - 202
See TURF.
LEASE—Building—Contract—Undefined works
See SPECIFIC PERFORMANCE. - [232
—— Building — Custom of estate — Equitable mortgagee—Alleged negligence 582, 587
See EQUITABLE MORTGAGE.
—— Ecclesiastical—Sub-perpetuity—Variation of rent - - - - - - 446
See VARIABLE RENT.
—— Renewable—Sale under Land Acts—Fines—Priority - - - - - - 467
See RENEWABLE LEASE.
—— Wife entitled to—Purchase by husband of reversion - - - - - 393
See MERGER.
LEGACY—Absolute gift—Restriction on enjoyment—Gift over—Survivors - 1
See ABSOLUTE GIFT.
—— Foreign missions - - - - - 228
See CHARITY.
—— Nieces and nephews—Misdescription—Uncertainty - - - - - - 155
See UNCERTAINTY.
LICENSE—Public-house—Sale—Indorsement of certified copy - - - - - 350
See PUBLIC-HOUSE.
LIFE ESTATE.
See ESTATE FOR LIFE.
LIGHT—Obstruction—Mandatory injunction
See MANDATORY INJUNCTION [541, 561, 577
LIMITATIONS, STATUTE OF—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 51 (7)—*Time for payment of debt—County Council.*] The Local Government (Ireland) Act, 1898, sect. 51 (7), enacts that every debt, claim, or demand, which is directly or indirectly payable out of the poor rate, shall be paid within the half-year in which the same was incurred or became due, or within three months after the expiration of such half-year, but not afterwards. The plaintiffs, misled by incorrect figures in certain reduced bills of quantities, tendered, in 1896, to the Commissioners for general control and superintendence and directing the erection of asylums for the lunatic poor in Ireland, for certain works connected with the building of an asylum. The tender was accepted by the Commissioners, all whose rights, powers, and liabilities, on the passing of the Local Government (Ireland) Act, 1898, became vested in the defendants. The works were completed, and the architect's certificate obtained, prior to 1905. The plaintiffs, in April, 1906, commenced an action for rectification and recovery of the sum due on the rectified contract:—*Held*, that the word "due" in section 51 (7) of the Local Government Act, 1898, means "recoverable by any legal process," and that the action was barred by the application of the said section. *Collen* v. *Dublin County Council* [ROSS, J., 503

LIMITATIONS, STATUTE OF—*continued.*
2. —— *Part payment — Disputed question of fact—Originating summons—Order LV., Rule 7—Practice.*] Certain lands were subject to a mortgage. Since 1884 no money was paid by the mortgagor in respect of the interest thereon, but the mortgagee, who was a sister of the mortgagor, alleged that bags of potatoes were sent every year by the mortgagor to her as mortgagee in lieu of payment of interest. The mortgagor alleged that they were sent merely as presents. The mortgagor died in 1905, and his executrix, in the schedule of assets, set out the mortgage as a subsisting incumbrance. A summons was taken out, under Order LV., Rule 7, by the personal representatives of the mortgagee, for an order declaring the mortgage well charged, and for a sale; and several conflicting affidavits were filed:—*Held* (1), that the present proceeding, being in the nature of an action for foreclosure, was not a proceeding to recover a sum of money charged on land, but to recover the land itself, and that, consequently, the title of the mortgagee after the expiration of the statutory period could not be revived by a subsequent acknowledgment; and (2) that the question whether the potatoes were sent in lieu of interest upon the mortgage debt, or as presents, involved a disputed question of fact, or of inference from facts, which was not to be decided upon a summons of this kind. *Beamish* v. *Whitney* - - BARTON, J., 38

3. —— *Residue held by executor for wrong party—Executor not express trustee for next-of-kin—Title of next-of-kin barred by Statute of Limitations.*] A testator who died in 1872 devised and bequeathed his freehold and leasehold property to his daughter B, and, in the event (which happened) of her dying unmarried, to his daughter C, absolutely. The gift was adeemed by the sale of the property in the lifetime of the testator. The purchase-money was invested by the testator in certain shares, which were held by him at the date of his death. The will contained no residuary bequest. The executors treated the shares as held on the same trusts as the lands, and paid the dividends to B, and after her death to D, the husband of C, who survived her. On the death of

LIMITATIONS, STATUTE OF—*continued.*
D, in 1906, his daughter E, who was personal representative of her father and mother, applied to the executor of the surviving executor to transfer the shares, which the executor declined to do, as he was advised that a question arose as to who was entitled. By consent the shares were sold, and the proceeds lodged in Court by the executor:—*Held*, that the executors were not express trustees of the shares for the next-of-kin; that the title of the next-of-kin to the shares was barred by statute: and that E was entitled to the fund. *In re Lacy* ([1899] 2 Ch. 149) followed. *In re M'Causland's Trusts*
[KENNY, J. (for M.R.), 327

4. —— *Tithe rentcharge — Discontinuance of receipt—Subsequent receipt from person not liable—* 3 & 4 *Wm.* 4, *c.* 27, *s.* 3—37 & 38 *Vict. c.* 57, *s.* 1.] A tithe rentcharge was not paid for a period of three and a half years from 1886. At the end of that time the owners of the tithe rentcharge, acting upon false information, innocently given, applied to the agent of a third party, who had not then, and never had, any estate or interest in the lands liable thereto, and who was not in privity in any way with the owners thereof, and received from him the arrears and all subsequent gales as they accrued due:—*Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that there had not been a discontinuance of receipt within the meaning of section 3 of 3 & 4 Wm. 4, c. 27. *In re Winter's Estate* WYLIE, J., 529; APP. 535

LIQUIDATOR — Costs — Sale of mortgaged premises - - - - - - 473
See COSTS.

LOCAL GOVERNMENT—Limitation of time for payment of debt—61 & 62 Vict. c. 37, s. 51 (7) - - - - - - 503
See LIMITATIONS, STATUTE OF. 1.

LOCAL REGISTRATION OF TITLE — Owner in fee—Graft - 190, 201
See GRAFT. 2.

LUNATIC—Dangerous—Maintenance of soldiers and sailors sent to District Asylum 21, 31
See CRIMINAL LUNATIC.

MANDATORY INJUNCTION — *Light — Obstruction — Substantial interference—Actionable nuisance—Substituted light.*] In an action for the obstruction of ancient light in the plaintiff's building (purchased by him at a cost of £1950) by a new red-brick building, erected at a great expense after remonstrance by the plaintiff, Barton, J., held that an obstruction, amounting to an actionable nuisance, had been caused by the new building, and, by a decree dated the 3rd March, 1906, granted an injunction restraining its continuance so as to cause such actionable nuisance; but intimated that such injunction would not be enforced for a period sufficient to enable the

MANDATORY INJUNCTION—*continued.*
defendants to abate the nuisance. The defendants then caused the red-brick wall of the new building, which intercepted the light, to be faced with white tiles, which they alleged so improved the light coming to plaintiff's windows as to abate the nuisance. Upon motion by the plaintiff for a writ of sequestration, Barton, J., pointing out that the plaintiff had no prescriptive right to the substituted light, and being of opinion that the damage to the plaintiff's windows from the wall, even if faced with white, would be not less than £500, on the 19th January, 1907, ordered a writ of sequestration to issue. On an appeal by the defendants against both the judgment of 3rd March, 1906, and the order of 19th January, 1907, it was held by the Court of Appeal that, having regard to the amount of damages and the circumstances of the case (including the effect of the white tiles), the plaintiff was not entitled to an injunction, but (on the plaintiff declining to accept £500 damages) directed an inquiry as to damages, the costs of same to depend upon the result, as if defendants had lodged £500 in Court. *Held*, on appeal by the plaintiff to the House of Lords, that the order of the Court of Appeal should be reversed, and the order of Barton, J., restored. *Per* Lord Robertson: The Court would not be justified in holding that an actionable obstruction of ancient light could be justified by the substitution of light reflected from a white surface, when the injured owner had no legal right to the continuance of these newly-created conditions. *Black* v. *Scottish Temperance Life Assurance Co.* BARTON, J., 541; APP. 561; [H.L. 577

MEMORIAL—*Of registered deed—Evidence—Duplicate—Proof of loss of original.*] *Semble*: A memorial of a Landed Estates Court conveyance lodged in the Registry of Deeds, being a duplicate of the original conveyance, may be received in evidence without proof of the loss of the original. *Staples* v. *Young* - ROSS, J., 135; APP. 139

MERGER—*Husband and wife—Chattels real of wife married prior to* 1883—*Purchase by husband of reversion in fee.*] The mere purchase by a husband of the reversion in fee of chattels real, the property of a wife married before 1883, does not *per se* operate as a merger of the terms. *Hurley* v. *Hurley* - - - BARTON, J., 393 [APP.]

MINERALS—Reservation—Right of agricultural tenant to remove sand - 135, 139
See SAND.

MISDESCRIPTION — Will — Nieces and nephews—Uncertainty - - 155
See UNCERTAINTY.

MISTAKE—Building contract—Rectification
See RECTIFICATION OF CONTRACT. [503
—— In law—Variable rent—Over-payment 446
See VARIABLE RENT.

MISTAKE—*continued.*
—— Ownership of residue—Express trust 327
See LIMITATIONS, STATUTE OF. 3.
—— Payment of tithe rentcharge by stranger 529
See LIMITATIONS, STATUTE OF. 4. [535
MORTGAGE— Equitable — Priority — Alleged negligence - - - - 582, 587
See EQUITABLE MORTGAGE.
—— Fraud— Constructive notice - 261, 333
See FRAUD. 1, 2.
—— Statute of Limitations — Acknowledgment after bar by statute— Part payment— Originating summons—Practice - 38
See LIMITATIONS, STATUTE OF. 2.
—— Winding up—Sale—Costs - - 473
See COSTS.
NEGLIGENCE—In not obtaining title-deed—Equitable mortgage—Priority 582, 587
See EQUITABLE MORTGAGE.
NEXT-OF-KIN— Executor — Intestacy as to residue—Express trust - - 327
See LIMITATIONS, STATUTE OF. 3.
NON-TIDAL LAKE—Several fishery — Public user—Prescription - - - 358
See FISHERY.
NOTICE—Constructive - - 261, 333
See FRAUD. 1, 2.
ORDERS, GENERAL—LV., R. 7 - 38
See LIMITATIONS, STATUTE OF. 2.
ORIGINATING SUMMONS—Disputed questions of fact - - - - - 38
See LIMITATIONS, STATUTE OF. 2.
OVER-PAYMENT—Mistake in law - 446
See VARIABLE RENT.
PART PAYMENT — Interest on mortgage — Summons - - - - - 38
See LIMITATIONS, STATUTE OF. 2.
PAYMENT—Dividends—Mistake - 327
See LIMITATIONS, STATUTE OF. 3.
—— Interest on mortgage—Disputed question of fact—Originating summons - 38
See LIMITATIONS, STATUTE OF. 2.
—— Over-payment—Mistake in law - 446
See VARIABLE RENT.
PERPETUAL ANNUITY—Purchase of, by tenant for life of lands charged — Irish Church Act, 1869, s. 34, sub-s. 8 237
See GRAFT. 1.
POLICY OF INSURANCE—Condition—Arbitration clause—Difference— Question of fraud - - - - - 245, 252
See ARBITRATION.
POWER—Appointment—Revocation - 387
See REVOCATION OF APPOINTMENT.
PRACTICE—Accommodation works — Award— Enforcement by summary petition 321
See ACCOMMODATION WORKS.
PRACTICE—*continued.*
—— Appeal to House of Lords—Order of Land Judge—Land Law (Ireland) Act, 1896, s. 31 (4) - - - - - - 452
See REDEMPTION.
—— Infringement of Trade Mark — Label—Inspection by Judge - - 43, 73, 466
See LABEL.
—— Injunction
See INJUNCTION.
—— Originating Summons—Disputed questions of fact - - - - - - 38
See LIMITATIONS, STATUTE OF. 2.
—— Receiver—Jointure - - - 402, 411
See JOINTURE.
—— Receiver Judge—Exclusive jurisdiction of
See RECEIVER JUDGE. [511
—— Winding up—Sale of mortgaged premises—Costs - - - - - - 473
See COSTS.
PRESCRIPTION — Several fishery — User by public - - - - - - 358
See FISHERY.
PRICE—Estimation of—Zone limits — Jurisdiction of Estates Commissioners 111, 119
See LAND LAW (IRELAND) ACTS. 3.
—— Sale within zones—Jurisdiction of Estates Commissioners - - - 161, 172
See LAND LAW (IRELAND) ACTS. 4.
PRIORITY — Equitable mortgages — Alleged negligence in not obtaining title-deed
See EQUITABLE MORTGAGE. [582, 587
—— Fines— Renewable lease—Sale under Land Acts - - - - - - 467
See RENEWABLE LEASE.
—— Redemption of rent out of lands indemnified therefrom — Indemnifying lands — Land Law (Ireland) Act, 1896, s. 33 (4) 452
See REDEMPTION.
—— Re-issue of debentures - - - 279
See DEBENTURES.
—— Sale subject to jointure with indemnity— Prior incumbrances—Indemnifying lands not sold - - - - - 402, 411
See JOINTURE.
PUBLIC-HOUSE—*Specific performance—Sale of licensed premises—Condition of sale—License stated to be "the property" of mortgagees—License retained by mortgagees—Purchaser's requisition to indorse certified copy of license—Sale free from incumbrance—Form of conveyance.*] Upon the sale of premises, which included a public-house, one of the conditions of sale was as follows:—"The vendor shall do all acts necessary and competent to her to enable the purchaser to obtain a transfer to him of the retail license, which is the property of Messrs. *B. & C.*, Ltd., attached to the premises; but the failure to secure the said transfer (unless caused by wilful default of the vendor) shall not

PUBLIC-HOUSE—*continued.*
annul the sale, nor shall any reduction be made in the amount of the purchase-money by reason thereof." *B. & C.* were mortgagees, and the vendor was unable to produce the original license, which was in their hands. The mortgage contained a recital that the license was the property of *B. & C.*, and a trading agreement. The premises were being sold free from incumbrances, and the mortgage was to be discharged out of the purchase-money. *B. & C.* had retained the license, and proposed to require the purchaser to enter into a trading agreement. The purchaser required the vendor to indorse a copy certified in accordance with sect. 36 of the Licensing (Ireland) Act, 1874, which the vendor declined to do. The vendor insisted on having words inserted in the conveyance to the effect that the premises were being sold subject to *B. & C.'s* ownership of the license, to which the purchaser objected:—*Held*, that the vendor could not reasonably refuse to indorse a certified copy of the license in respect of her interest therein; that she was not entitled to require the insertion of any such words as had been insisted on; and that, therefore, the purchaser was entitled to specific performance, which was the relief claimed. *Lucy* v. *Sexton* BARTON, J. 350

PURCHASER FOR VALUE — Constructive notice - - - - 261, 333
See FRAUD. 1, 2.

RAILWAY COMPANY — Accommodation works Award, enforcement of - 321
See ACCOMMODATION WORKS.

RECEIVER—Charges of mismanagement—Exclusive jurisdiction of Receiver Judge
See RECEIVER JUDGE. [511

—— Jointure — Indemnifying lands — Incumbrances—Priority - - 402, 411
See JOINTURE.

RECEIVER JUDGE—*Administration of estate—Charges as to management against receiver—Judge of Chancery Division—Tribunal for investigation of charges—Jurisdiction.*] Application to vary an order, referring it to the Receiver Judge to appoint a receiver, so far as such order related to the demesne and mansion-house and the shooting, and that a manager might be appointed over the same. The estate was being administered in the Court of the Master of the Rolls. Most of the lands, except the demesne (which included a home-farm), had been sold. The order appointing a receiver was made by Monroe, J., on the 22nd June, 1893. Certain charges as to the management of the demesne and home-farm were made against the receiver:—*Held*, that the charges, if persisted in, should be made before the Receiver Judge, and that the Rolls Court was not the proper tribunal for the investigation of the matter. *King-Harman* v. *Cayley* - - - M. R. 511

RECTIFICATION OF CONTRACT—*Mistake—Tender for buildings—Bills of reductions.*] Plaintiffs, building contractors, tendered to the defendants for the building of an asylum. The defendants, deeming the cost too high, directed their quantity surveyors to prepare bills of reductions, showing reduced works and reduced prices. Owing to a reference letter being misplaced, there was an error in the total cost as appearing from the bills of reductions, the total sum being put at £830 less than the correct figure. The plaintiffs, in the mistaken belief that the aggregate cost of the reduced works was as stated in the reduced bills of quantities, tendered for one bulk sum, which tender was accepted by the defendants, and the works completed. In an action for rectification, and recovery of the sum due on the rectified contract:—*Held*, that the mistake could be rectified so as to carry out the real intention of the parties. *Collen* v. *Dublin Co. Council* - Ross, J., 503

REDEMPTION—*Of liability for rent out of estate indemnified therefrom—House of Lords—Competency of appeal—Land Judge—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 31, *sub-sect.* 4; *sect.* 33, *sub-sect.* 4—*Land Purchase Acts—Right over against indemnifying lands—Priority—Construction of statute.*] Upon appeal to the House of Lords from the decision of the Court of Appeal ([1907] 1 I. R. 311, sub nom. *In re Thomson's Estate*; *O'Connell, Petitioner*):—*Held* (Lord Ashbourne *dubitante*), that, notwithstanding sect. 31, sub-sect. 4, of the Land Law (Ireland) Act, 1896, which confers certain powers on the Land Judge, in like manner as if he were the Land Commission, the appeal lay. *Held*, also, that the order of the Court of Appeal should be reversed, and that of Mr. Justice Ross ([1907] 1 I. R 190) should be restored. *De Vesci* (*Viscountess*) v. *O'Connell* - - - - - [H. L. 452

—— Debentures - - - - - 279
See DEBENTURES.

—— Renewable lease—Rent —Fines — Priority
See RENEWABLE LEASE. [467

REGISTRATION—Subject to equities—Graft
See GRAFT. 2. [190, 201

RE-ISSUE—Debentures - - - 279
See DEBENTURES.

RENEWABLE LEASE — *Land Purchase Acts—Lands sold held under lease for lives renewable for ever—Arrears of renewal fines — Payment of—Priority.*] Where lands held under a lease for lives renewable for ever are sold under the Land Purchase Acts, the redemption-price of the rent reserved by the lease is entitled to be paid in priority to any claim for arrears of renewal fines. *In re Ryan's Estate* - - WYLIE, J., 467

RENT—Arrears—Irish Land Act, 1903, s. 24 (8) [120, 125
See LAND LAW (IRELAND) ACT. 2.
——Arrears—Judicial tenants—Sale within zones—Jurisdiction, Estates Commissioners [161, 172
See LAND LAW (IRELAND) ACTS. 4.
—— Redemption — Indemnifying lands — Land Law (Ireland) Act, 1896, ss. 31 (4), (33) 4—Appeal to House of Lords - 452
See REDEMPTION.
—— Renewable lease—Fines—Priority - 467
See RENEWABLE LEASE.
—— Variable—Sub-perpetuity—Over-payment—Mistake in law - - - - 446
See VARIABLE RENT.

RENTCHARGE.
See ANNUITY.

RENTS AND PROFITS—Tenant for life not entitled to receive—Vendor—Bonus 222
See BONUS. 1.

RESERVATION—Fee-farm grant—Mines and minerals—Sand — Right of agricultural tenant to remove - - 135, 139
See SAND.

RE-SETTLEMENT—Restoration of former life estate and power—Settled Land Acts 475,
See COMPOUND SETTLEMENT. [488

RESIDUE—Intestacy as to — Next-of-kin — Statute of Limitations - - 327
See LIMITATIONS, STATUTE OF. 3.

REVERSION—Lease vested in wife—Purchase by husband - - - - - 393
See MERGER.

REVOCATION OF APPOINTMENT—*Settlement—Appointment pursuant to a power to appoint by deed—Part revocation by will—Whether valid.*] By settlement, executed on the marriage of *G.B.*, certain lands were vested in trustees for a term of years, upon trust to raise for younger children such sum, not exceeding £20,000 and not less than £10,000, as *G. B.* should by *deed* appoint, and in default of appointment the sum of £10,000: the said sum so appointed, or the sum of £10,000, to be paid to all or such one or more of the children as the said *G.B.* should by deed, with or without power of revocation and new appointment, or by will or codicil, appoint. By deed the said *G.B.* appointed that a sum of £10,000 should be raised immediately after his death, and a further sum of £10,000 after the death of the survivor of himself and another, and thereby reserved a power of revocation of both said sums by deed or will. Subsequently, by his will. *G.B.* appointed the first of said sums among his younger children equally, and revoked the appointment of the second of the said sums:—*Held*, that the revocation by will of the appointment by said deed of the second of said sums was invalid, and, accordingly, that the sum

REVOCATION OF APPOINTMENT—*continued.*
so appointed remained a good and valid charge. *In re Gore-Booth's Estate* - WYLIE, J., 387

RIGHT OF ACTION — Arbitration clause in policy—Question of fraud - 245, 252
See ARBITRATION.

SAILOR — Maintenance in District Lunatic Asylum - - - - 21, 31
See CRIMINAL LUNATIC.

SAND—*Mines and minerals—Reservation of—Right of agricultural tenant to remove sand from holding.*] In applying the rule in *Hext* v. *Gill* (L. R. 7 Ch. App. 699) to the construction of a reservation by deed of mines and minerals, the Court must take into consideration all the circumstances of the particular case, the true nature of the transaction between the parties, and their real object as evidenced by the subject-matter of the grant. The plaintiff, who, in 1864, became entitled, under a Landed Estates Court conveyance, to an undivided moiety of a nominal fee-farm rent reserved by, and the benefit of a reservation of mines and minerals contained in, a fee-farm grant executed in 1632 by the owner in fee of lands, of which the defendant's holding now forms portion, sought to restrain the defendant from removing from the holding for non-agricultural purposes sand, which the plaintiff claimed to be included as a "mineral" in the reservation. The defendant's holding, save as to some 6 to 10 inches at the surface, consisted of pure sand to the depth of many feet, the layer at the surface being soil, comprised, as to five-sixths thereof, of pure sand, and, as to the remainder, of decomposed vegetable matter:—*Held*, by the Court of Appeal (reversing the decision of Ross, J.), that the sand in the holding was not included in the reservation of "mines and minerals" in the deed in question, and that the action should be dismissed. *Hext* v. *Gill* (L.R. 7 Ch. App. 699) considered. *Staples* v. *Young* [Ross, J., 135; APP. 139

SETTLED LAND ACTS—Compound settlement - - - - 475, 488
See COMPOUND SETTLEMENT.

SETTLEMENT—Compound - 475, 488
See COMPOUND SETTLEMENT.
—— Construction—Chattels limited to heirs 190,
See GRANT. 2. [201
—— Implied trust - - - - - 517
See IMPLIED TRUST.

SEVERAL FISHERY—Non-tidal lake 358
See FISHERY.

SIMILARITY—Label—Trade Mark 43, 73, 466
See LABEL.

SOLDIER — Maintenance in District Lunatic Asylum - - - - 21, 31
See CRIMINAL LUNATIC.

SOLICITOR — Independent — Transactions held to be fraudulent - - - - 333
See FRAUD. 1.
—— Tied public-house—Indorsement of certified copy of license—Form of conveyance, *See* PUBLIC-HOUSE. [350

SPECIFIC PERFORMANCE—*Building contract—Agreement for lease in consideration of contract to rebuild and repair—Undefined works—Damages adequate compensation.*] The defendant agreed to take a lease of certain premises from the plaintiff, and within twelve months from the date of the agreement to expend the sum of £600 in such substantial repairs and improvements as were mentioned in the schedule to the agreement, viz. to take down, rebuild, and repair such portion of the premises as the plaintiff's architect should direct, under his direction, and to his satisfaction. The defendant did not execute the repairs and improvements mentioned in the schedule. The plaintiff brought an action against the defendant, claiming specific performance of the agreement to rebuild and repair the premises in accordance with the terms of the agreement, and damages by reason of the defendant's failure to carry out the agreement. There was no appearance for the defendant:—*Held*, that it was not a case for a decree for specific performance, but for an inquiry as to damages. *Wolverhampton Corporation* v. *Emmons* ([1901] 1 K.B. 515) discussed. *Rushbrooke* v. *O'Sullivan* M.R. 232

SPES SUCCESSIONIS—Will—Devolution of estate - - - - 297, 303
See BANKRUPTCY.

STATUTE OF LIMITATIONS.
See LIMITATIONS, STATUTE OF.

STATUTES:—
3 & 4 Wm. 4, c. 27—Statute of Limitations, s. 3 - - - - - - 529, 535
See LIMITATIONS, STATUTE OF. 4.
3 & 4 Wm. 4, c. 37—Church Temporalities, s. 138 - - - - - - 446
See VARIABLE RENT.
6 & 7 Wm. 4, c. 99—Church Temporalities
See VARIABLE RENT. [446
14 & 15 Vict. c. 70—Railways, s. 21 - 321
See ACCOMMODATION WORKS.
35 & 36 Vict. c. 90—Irish Church, s. 34, sub-s. 8 - - - - - - - 237
See GRAFT. 1.
37 & 38 Vict. c. 57—Statute of Limitations [529, 535
See LIMITATIONS, STATUTE OF. 4.
44 & 45 Vict. c. 49—Land Law, s. 20 - 104
See FAIR RENT.
45 & 46 Vict. c. 38—Settled Land, s. 2 (1)
See COMPOUND SETTLEMENT. [475, 488
—— —— s. 50 - - - - - - 222
See BONUS. 1.

STATUTES—*continued.*
45 & 46 Vict. c. 61—Bills of Exchange 261
See FRAUD. 2.
51 & 52 Vict. c. 49—Purchase of Land Amendment, s. 2 - - - - - 270
See LAND LAW (IRELAND) ACTS. 6.
54 & 55 Vict. c. 66—Local Registration of Title, s. 29 - - - - - 190, 201
See GRAFT. 2.
59 & 60 Vict. c. 47—Land Law (Ireland), s. 31, sub-s. 4; s. 33, sub-s. 4 - - 452
See REDEMPTION.
—— ——, s. 34 - - - - - 202
See TURF.
61 & 62 Vict. c. 37—Local Government, s. 51 (7) - - - - - - - 503
See LIMITATIONS, STATUTE OF. 1.
1 Edw. 7, c. 17—Lunacy (Ireland) ss. 3 (1), 6
See CRIMINAL LUNATIC. [21, 31
3 Edw. 7, c. 37—Irish Land, s. 1 (4) - 270
See LAND LAW (IRELAND) ACTS. 6.
—— ——, s. 3 - - - - - - 537
See LAND LAW (IRELAND) ACTS. 1.
—— ——, s. 6 - - - - - 111, 119
See LAND LAW (IRELAND) ACTS. 3.
—— ——, s. 21 - - - - - 202
See TURF.
—— ——, s. 24 (8) - - - 120, 125
See LAND LAW (IRELAND) ACTS. 2.
—— ——, s. 48 - - - - 15, 222
See BONUS. 1, 2.
—— ——, s. 53 (1) - - - - 18
See FORMER TENANT.
—— ——, s. 90 - - - - 446
See VARIABLE RENT.
—— ——, s. 98 (1) - - - 161, 172
See LAND LAW (IRELAND) ACTS. 4.
4 Edw. 7, c. 34—Irish Land, s. 3 - 15
See BONUS. 2.
7 Edw. 7, c. 50—Companies, s. 15 - 279
See DEBENTURES.
7 Edw. 7, c. 56—Evicted Tenants, s. 1, sub-s. 3
See EVICTED TENANT. [423, 434

STATUTORY CONDITION—Breach of 104
See FAIR RENT.

SUB-PERPETUITY—Variable rent—Overpayment—Mistake in law - - 446
See VARIABLE RENT.

SUPPLYING WORDS—*Will — Construction.*] Judgment of Barton, J. ([1907] 1 I. R. 440), affirmed. *Munroe* v. *Henderson* - APP. 260

SURVIVORS—Will—Construction - 1
See ABSOLUTE GIFT.

TENANT FOR LIFE AND REMAINDERMAN—Assignment by tenant for life of his estate—"Landlord"—Sale to tenants
See LAND LAW (IRELAND) ACTS. 5. [293

TENANT FOR LIFE AND REMAINDERMAN—*continued.*
—— Assignment by tenant for life of his estate—Undertaking by assignee to discharge incumbrances—Bonus - - 222
See BONUS. 1.
—— Graft—Local Registration of Title 190, 201
See GRAFT. 2.
—— Graft—Perpetual annuity—Irish Church Act, 1869, s. 34, sub-s. 8 - - - - 237
See GRAFT. 1.
—— Sale by tenant for life—Land Purchase Acts Death of vendor before completion—Bonus - - - - - - 15
See BONUS. 2.
TIME—Delivery of abstract and requisitions—"Immediately" - - - 213
See CONDITIONS OF SALE.
—— Statute of Limitations.
See LIMITATIONS, STATUTE OF.
TITHE RENTCHARGE—Discontinuance of receipt - - - - 529, 535
See LIMITATIONS, STATUTE OF. 4.
TITLE-DEED—Negligence in not obtaining
See EQUITABLE MORTGAGE. [582, 587
TRADE MARK—Infringement—Label
See LABEL. [43, 73, 466
TRUST—Express—Executor - - 327
See LIMITATIONS, STATUTE OF. 3.
—— Implied - - - - - - 517
See IMPLIED TRUST.
TURF—*Land Purchase Acts—Purchase of estate by Land Commission—Estate Commissioners—Sale of holding to tenant—Rights of adjoining tenants—Privilege—Regulations as to turbary—Land Law (Ireland) Act*, 1896, *s.* 34—*Irish Land Act*, 1903, *s.* 21.] The Land Commission purchased under sect. 6 of the Irish Land Act, 1903, an estate, on which *A.* was occupying tenant of a holding comprising a quantity of turf within its ambit. Prior to the sale to the Land Commission it was the custom for the landlord to supply other tenants on the estate with "bog-tickets," authorizing them to cut and take turf upon *A.*'s holding; but, save as to this, no easement, right, or privilege was exercised by anyone in relation to the said turf. *A* subsequently purchased the fee-simple of his holding from the Land Commission under the Act, and his undertaking to purchase was duly fiated by the Land Commission without reservation, express or implied, of any turbary rights:—*Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that sect. 21 of the Irish Land Act, 1903, did not, under these circumstances, empower the Land Commission to make regulations authorizing the cutting or taking of turf upon *A*'s holding by other occupiers of land in the neighbourhood of the holding, for whose requirements such turf appeared to the Land
TURF—*continued.*
Commission to be necessary. *Semble*: The cutting or taking of turf by one tenant upon the holding of another, under the authority of a "bog-ticket" given him by his landlord for that purpose, is not such a "privilege . . . enjoyed . . . by permission of the landlord" as is contemplated by sect. 34 of the Act of 1896. *In re King-Harman's Estate* - - - - APP. 202
UNCERTAINTY—*Will—Construction—Legatees—"Nieces and nephews"—Misdescription.*] A testatrix by her will bequeathed certain stocks and shares to her "nieces and nephews," coupled with the following directions:—"None of them to be sold, but the father and mother's name to be put in instead of mine, and they to receive the interest for them until they are twenty-one years old." After giving a legacy for masses and another pecuniary legacy, testatrix concluded her will as follows:—"If my husband should require money, he can get some of the interest of what is left to the children, the remainder to go for their keep." At the date of the will all the children of testatrix's brothers and sisters were of age, and none of them had both father and mother living. Several grandchildren, with their father and mother, lived with testatrix, and evidence was offered that she used to refer to them as "the little children," and expressed an intention to benefit them:—*Held*, that there were sufficient materials in the will, with the help of admissible explanatory evidence, to show that testatrix, in making a bequest to her "nieces and nephews," did not refer to the children of her brothers and sisters, but that there were not sufficient materials of a legal and admissible kind to enable the Court to determine definitely the objects of the bequest, and that consequently it was void for uncertainty. *M'Hugh* v. *M'Hugh*
[BARTON, J., 155.
VARIABLE RENT—*Ecclesiastical lease—Subperpetuity grant—Variation of rent—Church Temporalities Acts* (3 & 4 *Wm.* 4, *c.* 37; 6 & 7 *Wm.* 4, c. 99)—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 90—*Money paid by mistake of law to an officer of the Court.*] Where, by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible to determine the amount by which a variable rent should be varied, the rent is, by the application of section 90 of the Land Act, 1903, automatically varied. The head-grant in perpetuity, dated 31st August, 1839, made pursuant to the Church Temporalities Acts, contained, *inter alia*, a statement, as required by section 138 of the Act 3 & 4 Wm. 4, c. 37, as to the average price of oats for the period of ten years prior to the application for the head-grant. The sub-grant, dated 19th October, 1840, contained the usual recitals, and provided that the rent should be variable,

VARIABLE RENT—*continued.*
pursuant to the provisions of the said Acts, but contained no statement as to the average price of oats:—*Held*, that section 138 of the Act 3 & 4 Wm. 4, c. 37, applied only to head-grants in perpetuity, and that the rent reserved in the sub-grant was a variable one, to which, in consequence of the non-publication of the average prices of produce in the *Dublin Gazette*, section 90 of the Land Act, 1903, applied. The tenant of lands, the subject of the absolute order for sale in the Land Judge's Court, had for some years, in ignorance of her rights under section 90 of the Land Act, 1903, paid to the receiver a rent in excess of the rent properly demandable:—*Held*, under the special circumstances of the case, that the rent over-paid by the tenant in mistake of law should not now be refunded or credited to her. *Hillhouse* v. *Tyndall* [Ross, J., 446

VENDOR AND PURCHASER—Conditions of sale—Immediate delivery of abstract 213
See CONDITIONS OF SALE.

—— Purchase for value—Notice - 261, 333
See FRAUD. 1, 2.

WAIVER—Evicted Tenants Act, 1907, s. 1, sub-s. 3 - - - - - 423, 434
See EVICTED TENANT.

WILL—Abatement of legacies—Specific and demonstrative - - - - - 274
See ABATEMENT OF LEGACIES.

—— Absolute gift—Restriction as to mode of enjoyment - - - - - 1
See ABSOLUTE GIFT.

—— Appointment—Power to appoint by deed—Revocation by will—Invalidity of 387
See REVOCATION OF APPOINTMENT.

—— Devise until bankruptcy—Annulment—*Spes successionis*—Devolution of estate 297, [303
See BANKRUPTCY.

—— Foreign missions—Charitable purpose 228
See CHARITY.

—— Gift to wife—"To be held for her own use, and for the use of children" - 288
See ESTATE FOR LIFE.

WILL—*continued.*

—— Nieces and nephews—Misdescription—Uncertainty - - - - - - 155
See UNCERTAINTY.

—— Supplying words—Context - - 260
See SUPPLYING WORDS.

WINDING UP—Sale of mortgaged premises—Costs - - - - - - 473
See COSTS.

WORDS—"Arrears of rent . . . due"—Irish Land Act, 1903, s. 24 (8) - 120, 125
See LAND LAW (IRELAND) ACTS. 2.

—— "Criminal lunatic"—Lunacy (Ireland) Act, 1901, s. 3 - - - - - 21, 31
See CRIMINAL LUNATIC.

—— "Former Tenant"—Irish Land Act, 1903, s. 53 (1) - - - - - - 18
See FORMER TENANT.

—— "Heirs"—Settlement of chattels 190, 201
See GRAFT. 2.

—— "Immediately"—Conditions of sale 213
See CONDITIONS OF SALE.

—— "Landlord"—Land Purchase Acts - 293
See LAND LAW (IRELAND) ACTS. 5.

—— "Nieces and nephews"—Will - - 155
See UNCERTAINTY.

—— "Privilege"—Land Law (Ireland) Act, 1896, s. 34 - - - - - 202
See TURF.

—— "Survivors"—Will - - - - 1
See ABSOLUTE GIFT.

WORDS OF LIMITATION—Heirs—Chattels
See GRAFT. 2. [190, 201

WORDS, SUPPLYING.
See SUPPLYING WORDS.

ZONES—Limits—Advances—Limitations on
See LAND LAW (IRELAND) ACTS. 6. [270

—— Sale within—Declaration—Jurisdiction of Estates Commissioners - 161, 172
See LAND LAW (IRELAND) ACTS. 4.

—— Undertaking to purchase—Price—Jurisdiction of Estates Commissioners - 111, 119
See LAND LAW (IRELAND) ACTS. 3.

THE END.

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